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Cl. Sup. Ct. U. S.

# SUPREME COURT OF THE UNITED STATES.

## No. 114.

LESSEE OF JOSEPH C. PARRISH, PL'FF IN ER.,

vs.

ELIPHALET FERRIS, JOHN FERRIS, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

## ADDITION TO RECORD.

GOVERNMENT PRINTING OFFICE.

1337

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*Addition to record.*

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1 IN THE SUPREME COURT OF THE UNITED STATES.

JOHN DOE, ex dem. JOSEPH C. PARRISH,
plaintiff in error,
*v.*
ELIPHALET FERRIS, JOHN FERRIS, and others.

The plaintiff in error, by his attorney, suggests a diminution of the record in this cause, and moves the court for leave to add thereto (by consent of the opposite party) a certified transcript of the final judgment in the circuit court.

G. E. PUGH, *Att'y for Pl'ff.*

2 JOHN DOE, ex dem. JOSEPH C. PARRISH,
plaintiff in error,
*v.*
ELIPHALET FERRIS, JOHN FERRIS, and others.

On motion of the plaintiff in error, by his attorney, suggesting a diminution of the record in this cause, it is ordered, by consent of the defendants in error, that the certified transcript now produced and shown to the court of the final judgment and certificate in the circuit court of the United States for the southern district of Ohio be added to the record as if upon writ of certiorari issued and duly returned.

3 IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1861.

JOHN DOE, ex dem. JOSEPH C. PARRISH,
plaintiff in errror,
*v.*
ELIPHALET FERRIS, JOHN FERRIS, and others.
In error to the circuit court of the United States for the southern district of Ohio.

It is hereby agreed that the annexed transcript of the final judgment and certificate, omitted by misprision of the clerk of the circuit court of the United States for the southern district of Ohio, in transcribing the record of this cause, may be added by the clerk of the Supreme Court of the United States upon a mere suggestion
4 of diminution in that record, and without any writ of certiorari or other process.

G. E. PUGH,
*Att'y for Pl'ff.*
TAP & PERRY,
*For Def'ts in Error.*

CINCINNATI, *Nov.* 12*th*, 1861.

5 SATURDAY, *Nov.* 17*th*, 1860.

JOHN DOE, ex dem. JOSEPH C. PARRISH,
*vs.*
JOHN FERRIS *et al.*
} Ejectment. 970.

4 This cause came on to be heard upon the motion of the plaintiff to set aside the verdict of the jury heretofore rendered in this cause, and for a new trial; upon consideration whereof the court do overrule said motion. And it being shown to the court that the value of the property in controversy in this cause exceeds five thousand dollars, exclusive of costs, it is ordered, on motion of plaintiff, and by consent of the defendants, that the facts be so certified herein as matter of record. And thereupon it is considered by the court that the said defendants go hence, without day, and recover of the plaintiff
5 their costs in this behalf expended, taxed at $ and execution is awarded therefor.

UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

I, John McLean, clerk of the circuit court of the United States within and for the seventh circuit and southern district of Ohio, do hereby certify the foregoing judgment to be truly taken and copied from the journal of said court, of the date of the seventeenth
6 day of November, in the year of our Lord one thousand eight hundred and sixty, as the same remains in my office.

In testimony whereof, I have hereunto set my hand and affixed the
6 [L. S.] seal of said court this 26th day of July, A. D. 1861, and in the 86th year of the independence of the United States of America.

Attest:

JOHN McLEAN, *Clerk, &c.*

Filed 6 Dec., 1861.

42 words

6 folios & 42 words

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# SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1862.

[No. 114.]

THE LESSEE OF JOSEPH C. PARRISH
*v.*
ELIPHALET FERRIS AND OTHERS, } *Error.*

## POINTS FOR THE PLAINTIFF.

V. WORTHINGTON, Att'y.

13443

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# SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1862.

[No. 114.]

THE LESSEE OF JOSEPH C. PARRISH
*v.*
ELIPHALET FERRIS AND OTHERS, } *Error.*

## POINTS FOR THE PLAINTIFF.

**I.**—The dismissal of the petition of the plaintiff, as stated in the record, page 44, etc., forms no bar to the present action. Neither the record nor the opinion of the Court, in 6 Ohio State Rep. 563, shows the questions then disposed of to be the questions now under consideration, and of course the matters now before the Court are not *res adjudicata*.

Neafie *v.* Neafie, 7 John. Ch'y Rep. 1;
Elliott *v.* Pell, 1 Paige Ch'y Rep. 268;
Gibson *v.* McNeely, 11 Ohio State Rep. 133;
Lore *v.* Truman, 10 " " " 45;
Grant *v.* Ramsey, 7 " " " 162;
Loudenback *v.* Collins, 4 " " " 260;
Lockwood *v.* Wildman, 13 Ohio Rep. 450;
Bank U. S. *v.* Beverly, 1 Howard Rep. 133;
Apsden *v.* Nixon, 4 " " 467;
Smith *v.* Kemochen, 7 " " 216, 217;
Gaines *v.* Nicholson, 9 " " 356;
Stockton *v.* Ford 18 " " 418;
Gaines *v.* Hinnen, 24 " " 578;

Wash. Alex. Geo. S. P. Co. *v.* Sikles, 24 How. Rep. 341;
Wright *v.* Leklyne, 1 Peters C. C. Rep. 202;
Lawrence *v.* Vernon, 3 Sumner Rep. 20;
Siddon *v.* Tutop, 6 Term Rep. 607;
Webster *v.* Lee, 5 Mass. 334;
Bridge *v.* Gray, 14 Pick. Rep. 60;
Arnold *v.* Arnold, 17 Pick. Rep. 4;
Bates *v.* Thompson, 17 Pick. Rep. 14;
Sawyer *v.* Woodbury, 7 Gray Rep. 500;
Rogers *v.* Libby, 35 Maine Rep. 200;
Evans *v.* Peck, 11 Georgia Rep. 265;
Lents *v.* Wallace, 17 Penn. Rep. 412;
Hoey *v.* Freeman, 1 Barr Rep. 295;
Gardner *v.* Buckbee, 3 Cowen Rep. 120;
Burt *v.* Sternburgh, 4 Cowen Rep. 559;
Wood *v.* Jackson, 8 Wend. Rep. 9;
Miller *v.* Maurice, 6 Hill Rep. 121;
Doly *v.* Brown, 4 Comstock Rep. 71;
White *v.* Coatsworth, 2 Selden Rep. 143;
Henderson *v.* Kenner, 1 Richardson Rep. 474;
1 Greenleaf's Evidence, p. 642, sec. 532.

It is very clear the former suit was a bill in equity, under section 557 of the Civil Code of Ohio, to quiet the plaintiffs' title, and put an end to the defendants' claim then asserted by an action at law. The dismissal of the bill settled only, necessarily, that the plaintiffs were not entitled to a *quia timet* decree, and the defendants should not be debarred from asserting their title at law.

The question now presented involves the plaintiff's title at law, and his right to the possession under it. His title must now be shown to be paramount at law to all others. He must show title in himself complete at law.

In the former case, neither the record nor the report shows the questions now pressed upon the Court to have been then considered and passed upon; on the contrary, they show directly the converse.

Lore *v.* Truman, 10 Ohio State Rep. 54, 55;
Gibson *v.* McNeely, 11 " " " 133;
Parrish *v.* Ferris, 6 " " " 563;

The point adjudicated in the former case was this: "That where there is a devise *in fee* to A, but if he die without heirs, etc., to B in fee, if A have no children or issue living at the time he dies, then, B takes under such devise." The point now under consideration is this: There is a devise to A for life; remainder in fee to A's children, if he have any; and if not, remainder in fee to B. A has a child, which dies before A without issue; A dies; what becomes of the remainder after the termination of A's life estate? We say, upon the birth of the child, the remainder in fee vested in interest in it a fixed right of future enjoy-

ment (4 Kent's Com. 201); and upon its death the remainder in fee passed to its heir at law—to-wit, A—and cut off forever the remainder in fee over to B. This point we claim was not disposed of in the *quia timet* case, and is not *res adjudicata* between these parties. It is not enough to say the point has been incidentally considered, or may have been. The evidence must show it to have been raised, directly met, and disposed of.

Dutton *v.* Woodman, 9 Cush. Rep. 260;
McDowell *v.* Langdon, 3 Gray Rep. 513;
Eastman *v.* Cooper, 15 Pick. Rep. 279, 284;
Spooner *v.* Davis, 7 " " 147.

**II.**—Upon the death of Andrew Ferris, his estate passed to his daughter as his heir at law. Nothing passed under his will until it was probated. When probated, his daughter took, under his will, a life estate, which merged in the fee simple cast upon her by descent; and she held the estate in fee to feed and support the contingencies contemplated under the will. Upon the birth of her child, a vested fixed interest in remainder in fee of future enjoyment passed under the will to it, and upon its death, that interest fell upon her, and united

with her life estate, and she was by operation of law remitted to the fee simple estate cast upon her by descent. The law, under such circumstances, always favoring its own dispositions.

11 Ohio State Rep 84.
7 Ohio Rep 96, 98.
8 " " 5, 18, 239
6 " " 172, 174.
Swan's Stat, 1841, 996, Sec 33,

**III.**—Under the will of Andrew Ferris, his daughter Elizabeth A. took an estate for her life only. Such, then, was the law of Ohio.

Will act, March, 1840, sec. 47. Swan's Stat. 1841, p. 999.
King *v.* King, 12 Ohio Rep. 471.

**IV.**—Under that will, her child took an estate in fee simple, absolute in remainder, which, upon its death, passed to its mother as its heir at law, and

merged her life estate, or united with it, and gave her a fee simple in possession.

Ginger *v.* White, Willes Rep. 348;
Goodright *v.* Dunham, 1 Doug. Rep. 264;
Comberback *v.* Perryn, 3 Term Rep. 484;
Rex *v.* Marquis of Stafford, 7 East. Rep. 521;
Malcolm *v.* Taylor, 2 Russ. & Mylne Rep. 416;
Huchenson *v.* Stephens, 1 Keen Rep. 240;
Tookey's Trust, etc., 11 Eng. L. & E. Rep. 60;
Foster *v.* Hayes, 20 Eng. L. & E. Rep. 72;
Foster *v.* Hayes, 30 Eng. L. & E. Rep. 267;
Moore *v.* Lyon, 25 Wend. Rep. 119;
Miller *v.* Malcomb, 26 Wend. Rep. 229;
Van Vechen *v.* Pearson, 5 Paige Rep. 512;
Malcomb *v.* Miller, 9 Paige Rep. 265;
Carpenter *v.* Schemerhorn, 2 Barb. Ch'y Rep. 314;
Wolf *v.* Van Noshand, 2 Comstock Rep. 436;
Baker *v.* Lorillard, 4 Comstock Rep. 257;
Wright *v.* Baury, 7 Cush. Rep. 105;
Sisson *v.* Seaberry, 1 Sumner Rep. 243;
Williams *v.* Leach, 28 Penn. State Rep. 89;
King *v.* King, 12 Ohio Rep. 472;
Warren *v.* Jackson, 4 Peters' Rep. 90;
Ohio descent act, March, 1835, Swan's Stat. 1841, p. 286.
Curren *v.* Taylor, 19 Ohio Rep. 36.
Will act of 1840, sec. 49, Swan's Stat. 1841, p. 999.

We claim, by the law of wills in Ohio, it was competent for Mr. Ferris to make his will giving a life estate to his

daughter; a remainder in fee simple to her children, if she should have any, having none at the time of his will, nor at the time of his death; and if his daughter should die without children, the remainder in fee simple to his brothers and sisters, or their representatives. We also claim, by his will, his daughter took a life estate only, and her child an estate in fee simple in remainder. This estate vested, upon its birth, as a fixed right, in interest and in title, but not in possession. Upon its death, this fee simple estate fell upon its mother, as its heir at law, by the terms of the will, under the statute of descents then in force. Had this child have lived to have had issue, and then died in the life of the mother, such issue would have taken as heir at law to the child. Had such child have survived its mother without issue, and then so died, the defendants would have taken as its heirs at law, and not as devisees under the will.

V.—The devise in Andrew Ferris' will, in favor of his brothers and sisters, etc., in these words: "If my daughter Elizabeth A. shall die without children, then, and in that case, I give and bequeath the same real estate to my brothers and sisters, their

heirs and assigns forever, after the death of Elizabeth A. as aforesaid"—never took effect, and was cut off by the vesting of the intermediate devise to the children of the said Elizabeth A.

Feame on Remainders, *295;
2 Jarmin on Wills, *270;
7 East. Rep. 521;
1 Doug. Rep. 264;
3 Term Rep. 484;
5 Paige Rep. 512;
9 Paige Rep. 265;
26 Wend. Rep. 229;
7 Cush. Rep. 105;
1 Keen Rep. 246;
2 Russ. & Mylne Rep. 416;
30 Eng. L. & E. Rep. 367.

18 B. Mon. Rep. 329. 367. 369
370. 371 - 376

In Mr. Ferris' will, the word "children" accords with its popular use, and designates the immediate offspring of his daughter, and can not be extended to a wider range of objects, so as to import "issue." The limitation to her children, if she had any, "*their heirs and assigns*," excludes, in the use of the word, the import or range of objects contemplated in the use of the word "issue." t2 Jarmin on Wills, *69, ch. xxxi: *328, ch. xl. Had he testator stopped in the limitation with the word "chil-

dren," and dropped the words "their heirs and assigns," then there might have been some ground to claim he meant issue, as his daughter then had no child; but these superadded words, "their heirs and assigns," drive us from that position, and force us back upon the use of the word, in its primary and popular sense, as the immediate offspring of his daughter.

2 Jarmin on Wills, *339, *368;
Doe *v.* Collis, 4 Term Rep. 294;
Ginger *v.* White, Willes, 348;
Goodright *v.* Dunham, 1 Doug. Rep. 264;
Malcolm *v.* Taylor, 2 Russ. & Mylne Rep. 416.

In the use of the words "without children," in the limitation over, the testator uses the word "children" as referring to the same class of objects as in the limitation in favor of that class, and in the same sense. And as, in the one case, he meant that class should take when it came in, so he meant, in the other, the class over should not take if it did.

2 Jarmin on Wills, *398;
1 Doug. Rep. 264;
Willes, 348.
10 Ohio State Rep. 315.

**VI.**—The ruling of the Court, in the case of *Parrish* v. *Ferris*, 6 Ohio State Rep. 563, can not be fairly considered as having any application to a case like that now under consideration, but to be applicable to a case where the primary devisee takes an estate in tail, or in fee simple, subject to be defeated by the failure of issue.

Niles *v.* Gray, 12 Ohio State Rep. 320.

If, in this case, the limitation had been to the daughter of the testator, and the heirs of her body, or her children, or issue, etc., and upon the default of such heirs, etc., over to the testator's brothers and sisters, etc., then the ruling in the two last cases would apply in harmony with the ruling in England and in this country, as all the cases cited by the adverse counsel show. But it must not be forgotten that our statute of entailments (Swan's Stat. 1841, p. 319) would, in certain contingencies, intervene and break up this harmony, as it turns an entail into a fee in the issue of the first donee in tail. However that may be, where the limitations be as they are in this case, then the limitation over stands as we claim, as an alternative remainder, intended as a substitute, in case the first limita-

tion in fee fails, and does not take effect at all. This is the more manifest, when we recollect that a life estate in Ohio, under the statutes of wills of 1840 and since, can not be enlarged into a fee tail or fee simple under the rule in Shelly's case, followed in *McFeely* v. *Moore*, 5 Ohio Rep. 464, and *Armstrong* v. *Zane*, 12 Ohio Rep. 299; though words that otherwise would import an indefinite failure of issue may be cut down to a special meaning, in order to save the devise from the indefinite failure. But here again we are met by the entailment act, that checks the flow of the entailment, and creates a diversion of the title, and impairs the force of this ruling of the Courts. This, however, is not a matter that is involved in the present case.

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# CIRCUIT COURT OF THE UNITED STATES.

## SOUTHERN DISTRICT OF OHIO.

JOHN DOE EX DEM. JOSEPH C. PARRISH,
*Against*
ELIPHALET FERRIS, AND OTHERS.
} *Ejectment.*

## ARGUMENT FOR PLAINTIFF.

By WORTHINGTON & MATTHEWS.

# CIRCUIT COURT OF THE UNITED STATES.

## SOUTHERN DISTRICT OF OHIO.

JOHN DOE EX DEM. JOSEPH C. PARRISH,
*against*
ELIPHALET FERRIS, AND OTHERS. } *Ejectment.*

## STATEMENT OF FACTS.

1. ANDREW FERRIS, having an only daughter, Elizabeth A., unmarried, on June 7, 1849, made his will, containing the following devises of his real estate, being the same now in controversy, in Hamilton County, where he resided and died, viz:

"*Second.* I give to my daughter, Elizabeth A., the use of the *real estate* (describing it) during her natural life time. To have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live.

*Third.* I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs), their heirs and assigns forever, all the above described *real estate*, after Elizabeth is done using or occupying it, and at Elizabeth's death.

*Fourth.* If my daughter, Elizabeth A., shall die without children, then, and in that case, I give and bequeath the said *real estate* to my brothers and sisters, their heirs and assigns forever, after the death of Elizabeth A., as aforesaid."

# CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF OHIO.

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*Third.* I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs), their heirs and assigns forever, all the above described *real estate*, after Elizabeth is done using or occupying it, and at Elizabeth's death.

*Fourth.* If my daughter, Elizabeth A., shall die without children, then, and in that case, I give and bequeath the said *real estate* to my brothers and sisters, their heirs and assigns forever, after the death of Elizabeth A., as aforesaid."

2. Andrew Ferris died on the 15th June, 1849. His will was duly admitted to probate and record, on 26th June, 1849. His daughter, Elizabeth A., being in possession of the premises, was married March 6, 1850, to Francis A. Parrish.

3. On 17th August, 1852, the said Elizabeth A. had issue, born alive, which lived only about one hour.

4. On 22d August, 1852, the said Elizabeth A. made her will, devising to her husband, Francis A. Parrish, all her property, and died, leaving no child surviving her. On 22d September, 1852, her will was duly admitted to probate and record.

5. The defendants in this action, are the brothers and sisters of the said Andrew Ferris, or their heirs at law.

6. On 13th May, 1853, the defendants in the present action, brought their action of ejectment in the Court of Common Pleas of Hamilton County, to which Francis A. Parrish became the real party defendant, to recover possession of the real estate now in controversy, which was taken by appeal to the District Court of the County, in which it is still pending.

7. On 13th July, the said Francis A. Parrish filed his petition in the Court of Common Pleas of this county, against the present defendants, in which he alleged he was seized in fee of the said premises, and in possession thereof, that the defendants claimed some title thereto adverse to him, which he prayed the Court to determine against, and to enjoin them from asserting.

The defendants filed their answers claiming title, as against the plaintiff, under the will of Andrew Ferris, and setting up by counter-claim their right of possession, which they asked might be awarded to them.

This case was carried by appeal to the District Court,

and in that, reserved for decision to the Supreme Court, where a final judgment was rendered upon an agreed statement of facts, declaring that, under the will of Andrew Ferris, the defendants became entitled to the premises in fee on the death of Elizabeth, dismissing the plaintiffs' petition with costs, but entering no judgment in favor of the defendants, on the counter-claim, as to the possession.

8. Francis A. Parrish died intestate November 9, 1854, in possession of said real estate, leaving his brothers and sister, Thomas Parrish, Esther A. Parrish, Joseph C. Parrish and William M. Parrish, his heirs at law.

9. On 1st March, 1858, the said Thomas Parrish, his brothers and sister being in possession of the said real estate, by their tenants, the defendants in this action, without any writ or process of law, took and have ever since remained, in possession of the same.

10. Prior to the commencement of this suit, Thomas Parrish, Esther A. Parrish and William M. Parrish, by deed, duly executed and delivered, conveyed all their title in said real estate to the said Joseph C. Parrish, the lessor of the plaintiff, in fee simple, he being a citizen of the State of Iowa.

## PROPOSITIONS OF LAW.

**I.**—Elizabeth A. Ferris, afterward Parrish, under the will of her father, took the legal estate, in the premises in controversy, for her natural life.

The expressions used in the devise, in relation to her having its *use* and *control,* do not qualify it.

**II.**—The first limitation in remainder to her children, was a remainder in fee, *contingent* on the birth of a child, became *vested* when that event happened, subject to open and let in after born children, but was not liable to be divested on any subsequent contingency; and becoming vested, exhausted the entire estate, preventing the possibility of the vesting of the second or alternative limitation in fee, to the testator's brothers and sisters.

**III.**—The second limitation in remainder, was contingent on the event of her not having any child, being concurrent with the first, until the event happened, and alternative to it, intended as a substitute, in case the first did not vest, and was destroyed, as to the possibility of its ever taking effect, the moment, by the birth of a child, the first remainder in fee vested.

Both these limitations were contingent remainders. They are not executory devises, the rule being imperative that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise.

1 *Jarman on Wills,* 778.

A remainder is contingent when limited to take effect, either to an uncertain person or upon an uncertain event; and vests, the moment the person becomes fixed, or the event happens, during the preceding estate, or at its expiration.

2 *Blacks.*, 169.

Here the contingency was whether Elizabeth would have any children. The moment one was born, the remainder in fee vested.

This construction is demanded by the words of the will.

1. The limitation to the children of the testator's daughter, is an independent, express, and absolute devise in fee simple, and is not to be cut down by implications, or ambiguous expressions subsequently used.

   2 *Jarman on Wills,* 742; xi and xii Rules of Construction and Cases cited.
   *Hutchinson* v. *Stephens,* 1 Keen Rep., 240.

2. The language of the parenthetical clause in the third item of the will, "*if she shall have any heirs,*" means, "*if she shall have any children,*" and is expressive of the only condition annexed to the limitation, viz: the birth of a child, and thereby excludes every other contingency.

   The word "heirs," in its *popular sense*, is synonymous with "*children.*"

   It is absurd to suppose it used, here, in its *technical sense*, because the very persons to whom the ulterior estate is limited, would be, in the absence of children, the *heirs* of the testator's daughter; she, clearly, *did have*

*heirs* in this sense, and if it is to be so taken, then the limitation to the children certainly vested.

3. The concluding words of the third item, "*after Elizabeth is done using or occupying it, and at Elizabeth's death*," and of the fourth item, "*after the death of Elizabeth as aforesaid*," are simply descriptive of the termination of the life estate, denoting the time when the remainder shall—not vest in interest, but—take effect in possession.

   1 *Jarman on Wills*, 726.
   *Doe ex dem. Comberbach* v. *Perryn*, 3 Term R., 494.
   *Olney* v. *Hull*, 21 Pick. R., 311.
   *Bowers* v. *Porter*, 4 Pick. R., 198.
   *Firson* v. *Dodge*, 23 Pick. R., 468.
   *Dingley* v. *Dingley*, 5 Mass. R., 535.
   *Moore* v. *Lyons*, 25 Wendell R., 119.
   *Poole* v. *Bott*, 17 Eng. Law and Eq. R., 13.
   *Carver* v. *Jackson ex dem. Astor*, 4 Peters, 1.
   *Doe ex dem. Barnes* v. *Provoost*, 4 Johns. R., 61.
   *Garnet* v. *Lyer*, 31 Penn. State R., 94.

4. The introductory words of the fourth item—"*If my daughter, Elizabeth A., shall die without children*"—were intended to describe the converse of the event on which the prior remainder was contingent, and mean "*if my daughter, etc., shall die without having children*," precisely as if they had been, "*In case the prior limitation in fee to my daughter's children does not become vested in consequence, of its objects, not coming into being.*"

   *a.* This construction is necessary to harmonize the provisions of the will. The two limitations in remainder being in fee,

cannot co-exist. The second must vest, if at all, either because the first has not and cannot, or, having vested, has become divested. But the first vested on the birth of a child. To divest it, it must be shown that *dying without children*, cannot mean, *dying without having children*.

*b.* Dying without *having* children, means, dying without *having had* a child.

***Weakley ex dem. Knight*** v. ***Ruggs***, 7 Term R., 322.

*c.* Dying without children may mean, either without having had a child, or without a child living at the death of the parent, or at the death of the testator, according to the context and situation of the parties.

***In re Biddle's estate***, 28 Penn. State R., 59.
***Pinbury*** v. ***Elkin***, 1 Peere Wms., 464.

*d.* Spoken in reference to one who, at the time, had no children, it means, without having had a child.

***De Haas*** v. ***Bunn***, 2 Barr Rep., 335.
***Goodtitle*** v. ***Billington***, Douglas, 753.
***Fearne on Cont. Remainders***, 266.

*e.* This is its uniform meaning when there is a limitation for life to the parent, remainder to his or her unborn children in fee, with a limitation over, in case the parent dies without children, which is the present case.

*Goodright* v. *Dunham*, 1 Douglas Rep., 264.
*Loddington* v. *Kime*, 1 Salkeld, 224, S. C.; 1 Lord Raymond, 203.
*Carter* v. *Barnardiston*, 1 Peere Wms., 504; 2 Bro. P. C., 1.
*Doe* v. *Holme, et al.*, 3 Wilson, 237; 2 Blackst., 777.
*Doe ex dem. Fonnereau* v. *Fonnereau*, 2 Douglas, 505.
*Goodtitle* v. *Billington*, Douglas, 753.
*Doe ex dem. Comberbach* v. *Perryn*, 3 Term R., 484.
*Rex* v. *Marquis of Stafford*, 7 East. R., 521.
*Burnsal* v. *Davy*, 1 Bos. & Puller R., 215.
*Crump* v. *Norwood*, 7 Taunton R., 362.
*Doe ex dem. Herbert* v. *Selby*, 2 Barn. & Cress., 926.
*Hutchinson* v. *Stephens*, 1 Keen Rep., 240.
*Right ex dem. Shortridge* v. *Creber*, 5 Barn. & Cress., 866.
*Gretton* v. *Haward*, 6 Taunton R., 94.
*Doe ex dem. Tooly* v. *Gunnis*, 4 Taunton R., 313.
*Doe d. Liversage* v. *Vaughan*, 6 Simon R., 358.
*Ashley* v. *Ashley*, 1 Dowl. & Ryl. Rep., 52, S. C.; 5 B. & Ald. R., 464.
*Denn d. Briddon* v. *Page*, 3 Term R., 87, *n.*
*Hay* v. *Earl of Coventry*, 3 Term R., 83.
*Doe d. Phipps* v. *Lord Mulgrave*, 5 Term R., 320.
*Foster* v. *Romney*, 11 East. R., 594.
*Goodright d. Lloyd* v. *Jones*, 4 Maule & Sel., 88.
*Purcell* v. *Purcell*, 2 Drury & Warren, 219, *n.*
*Ginger d. White* v. *White*, Willes, 348.
*Malcolm* v. *Taylor*, 2 Rus. & Mylne R., 416.
*North* v. *Martin*, 6 Simon, 266.
*In re Tookey's trust; in re Bucks Railway Co.*, 21 Law J. R., N. S. Chanc., 402, S. C.; 11 Eng. Law, and Eq. R., 60.
*Pye* v. *Linwood*, 6 Jurist, 618; 2 Jarman on Wills, 420, *n.*
*Maitland* v. *Chalie*, 6 Madd., 243.
*Ellicombe* v. *Gompertz*, 3 Myl. & Craig, 153.
*Woodcock* v. *The Duke of Dorset*, 3 Bro. C. C., 569.
*Powis* v. *Burdett*, 9 Vesey R., 428.
*Harrison* v. *Foreman*, 5 Vesey R., 207.
*Browne* v. *Lord Kenyon et al.*, 3 Madd., 410.
*Sturgess* v. *Pearson*, 4 Madd., 411.
*Baker* v. *Tucker*, 14 Jur., 771, S. C.; 2 Eng. Law and Eq. R., 1.
*Foster* v. *Hayes*, 17 Jur., 1050; 20 Eng. Law and Eq. R., 72; 30 Eng. Law and Eq. R., 267.
*Fearne on Cont. Rem*, 373, 374.

2 *Jarman on Wills*, 372.
*Miller* v. *Macomb*, 26 Wend. R., 229, S. C.; 9 Paige R., 265.
*Carpenter* v. *Schermerhorn*, 2 Barb. Chy., 314.
*Wolfe* v. *Van Nostrand*, 2 Comstock R., 436.
*Wright* v. *Baury*, 7 Cushing R., 105.
*Carver* v. *Jackson ex dem. Astor*, 4 Peters, 90.
*Sisson* v. *Seabury*, 1 Sumner, 243.
*Hannan* v. *Osborne*, 4 Paige R., 336.
*Clagget, adm'r of Beanes* v. *Worthington*, 3 Gill R., 83.
*Williams* v. *Leach*, 28 Penn. State R., 89.
*Minnig* v. *Batdorf*, 5 Penn. State R., 503.
*Isfell* v. *Maclin*, 24 Alabama, 315.
*De Haas* v. *Bunn*, 2 Barr R., 335.

*f.* The rule construing these words to mean dying without children or issue, *living at the death of the first taker*, is adopted for the purpose of avoiding the construction which would limit the ulterior estate upon *an indefinite failure of issue*, and has no application to cases like the one at bar.

*Tarbuck* v. *Tarbuck*, 2 Jarman on Wills, 376.
2 *Jarman on Wills*, 296.
*Daniel* v. *Thomson*, 14 B. Monroe R., 683.

*g.* The construction we contend for, is necessary to prevent the absurd consequence of cutting off the daughter's descendants, in case she should have children who had died in their mother's life time, leaving issue: for *dying without children*, cannot be held to mean *dying without descendants of every degree living at the death of the parent.*

2 *Jarman on Wills*, 70.
*Wyld* v. *Lewis*, 1 Atk. R., 432.
*Tenny* v. *Agar*, 12 East. R., 253.
*Doe* v. *Webber*, 1 Barn. & Ald., 713.
*Hawley* v. *Northampton*, 8 Mass., 41.
*Parkman* v. *Bowdoin*, 1 Sumner, 370.

**IV.**—The case of *Parrish Heirs* v. *Ferris, et al.*, 6 Ohio State Rep., 563, does not furnish a binding rule of decision for the Federal Courts.

*Lane* v. *Vick*, 3 Howard Rep., 464.
*Jackson* v. *Chew*, 12 Wheaton R., 167.
*Swift* v. *Tyson*, 16 Peters R., 1.
*Waring* v. *Jackson*, 1 Peters R., 570.
*Daly's Lessee* v. *James*, 8 Wheat. R., 495.
*Foxcroft* v. *Mallett*, 4 Howard R., 353.
*Williamson* v. *Berry*, 8 Howard R., 543.
*Van Ransellaer* v. *Kearney*, 11 Howard R., 258.
*Beauregard* v. *New Orleans*, 18 Howard R.. 497.
*Homer* v. *Brown*, 16 Howard R., 354.
*Abbott* v. *Essex Co.*, 18 Howard R., 202.
*Webster* v. *Cooper*, 14 Howard R., 488.

**V.**—The judgment in that case, is no bar, by way of estoppel.

*Civil Code of Ohio*, § 557, 558, 562, 563, Swan's Rev. Stat., 1854, p. 695.
*Homer* v. *Brown*, 16 Howard R., 354.
*Hickey's Lessee* v. *Stewart*, 3 Howard R., 759.
*Speed* v. *Braxdell*, 7 Ben Monroe R., 571.

**VI.**—The remainder in fee, vesting in the child of Elizabeth, and not being divested, on its death was transmitted to its mother as heir, under whom the lessor of the plaintiff derives title.

*Swan's Stat. of Ohio, Ed.* 1841, p. 286, § 1.

## ARGUMENT.

The result of the construction which we claim for the will of Andrew Ferris, deceased, is:

1. A life estate in the land in controversy to his daughter, Elizabeth, then unmarried.

2. A remainder in fee to her children, *contingent* upon her marriage and *their* birth, which, in the event as it actually happened, *vested* immediately upon the birth of a child, subject to open and let in after born children, but not liable to be *divested.*

3. An alternative remainder in fee, to the testator's brothers and sisters, *contingent* upon the death of Elizabeth, without *having had* any child, in whom the remainder in fee, previously limited, could *vest*, and the possibility of the taking effect of which was destroyed, by the vesting of the preceding remainder in fee, on the birth of the child, by which the whole estate was exhausted.

The construction contended for, by the other side, is:

1. A life estate to the testator's daughter, Elizabeth.

2. A remainder in fee to her children, *contingent*, 1st. Upon her having any; and 2d. Upon their surviving her.

3. A remainder in fee to the testator's brothers and sisters, *contingent* upon the death of Elizabeth, without a surviving child or children.

It is not disputed that, if an indefeasible fee simple estate, in remainder, vested at its birth in Elizabeth's child, it passed, on its death, to its mother as heir, under the Statute of Ohio.

*Swan's Stat.*, Ed. 1841, p. 286, § 1.

We agree that the point to be determined is the true *intention* of the testator: to be gathered from the *language*

which he has used to *express* it; which can be *explained* alone by proof of the circumstances of his situation, when he employed it; and *controlled* by nothing but positive *rules of law*, by which the policy of society has limited and established the right of property.

What would have been the true construction of this will, if it had omitted the limitation to the testator's brothers and sisters?

It would have been, to confer a life estate upon Elizabeth, with a remainder in fee to her children, *contingent* upon any such coming into being, *vesting* immediately upon the birth of the first, subject to open and let in any born after, but when once *vested*, not liable to be *divested;* and, until the *contingency* happened, by the birth of a child, there would have remained in the right heirs of the testator, an undisposed of *reversion in fee*, which, on the happening of the contingency, would have been absorbed by the vesting of the remainder in fee created by the will.

The authorities hereafter referred to make this plain, beyond dispute. The proposition, however, is elementary and needs no support. It is contained in the very definition of vested and contingent remainders, and lies at the root of all the law on that subject.

In the case supposed, the use of the words in the parenthesis (*if she shall have any heirs*), would not have changed this construction.

The word "*heirs*," is susceptible of three meanings:

1. Strictly and technically, it means those upon whom, on the death of a person, the law casts the inheritance and title of his real estate, and hence the phrase, "*Nemo est haeres viventis.*"

2. It is frequently used to denote those upon whom, if the ancestor should, at the time of speaking, immediately

die, the inheritance would devolve; and hence the expressions, "heir apparent" and "heir presumptive," applied to persons to denote their relations to another still living.

3. And very frequently, and particularly in common parlance, and by persons not referring to the technical application, it is used as synonymous with "issue" and "children."

In this case, Andrew Ferris certainly did not use the expression in the first of these senses; for it could hardly be said of his daughter, in that sense, that she could possibly *die without heirs*, for that would include all kindred, both in the lineal and collateral line, and of every degree.

It could not have been used in the second sense, because she had not, at the time of speaking, any issue whatever.

It must have been used, therefore, in the last sense, as synonymous with "children" or "issue."

It cannot be objected to this, that it makes the parenthesis superfluous; for it does not. We still give it its natural, appropriate and full effect.

With that meaning, it expresses the evident idea, that the testator was making a disposition of his property, with a full knowledge and recollection that his daughter was still unmarried, and might either die unmarried, or possibly marry and not have children.

But, in this sense, it interpolated into the limitation no new contingency. It only expresses that which, without it, would have been necessarily implied; for no child of Elizabeth could ever take, unless one should come into being.

To suppose that it conveys the idea, that the limitation was intended to take effect only upon the contingency that the child or children, designed to be benefited, should sur-

vive the mother, and thus become in that sense her *heirs*, implies this absurdity: that it was used with reference to its most refined and technical meaning, in a connection and for a purpose, in and for which, no person, having that idea in his mind, and acquainted with the technical forms of expressing it, would have employed it.

The will was evidently drawn by no expert and technical hand. No lawyer, learned in the phrases of conveyancing, or acquainted with the nature and definition of estates, would ever have used the language of the parenthesis, to express the contingency of Elizabeth's children outliving her. It is equally plain—indeed the inference is greatly stronger—that a man, unlearned in the definitions of the law, and relying only on his plain English to express a common man's meaning, would not have undertaken to express the contingency referred to, merely by the implication arising from the use of the word "heirs"—an implication which arises only from supposing it to be used in the sense of the maxim, which forbids its application to one not surviving the ancestor.

The contingency thus sought to be strained from the word "heirs," in the parenthesis, whereby to defeat the estate of Elizabeth's children, in the event of their not surviving their mother, would, certainly, be more plainly indicated if the word "*children*" had not been used at all. Suppose, then, the limitation had been to "*the heirs of my said daughter* (*if she shall have any*), *and their heirs and assigns forever.*" That reading is certainly stronger, for the argument we are answering, than the actual words of the will. Yet it certainly is not necessary to cite cases, or quote authorities, to prove that, in the case supposed, the word "*heirs*" is to be taken as a word of purchase, synonymous with *issue* or *children*, and that the limitation

takes effect, on the birth of a child, as a vested remainder in fee; and that, in fact, the language of the parenthesis so far from warranting the remote and refined inference of survivorship now attempted, simply denotes the natural doubt, in the case of an unmarried woman, as to whether she will ever have children or not. It seems very unnatural to hunt in this parenthesis for the secret contingency, by which a fee simple estate is to be divested and destroyed, when it plainly points only to the apprehension that it may never begin. It is too small a foundation for so large a superstructure. It is the result of an hypercriticism, of which it cannot be supposed that Andrew Ferris was capable, and to which his will ought not to be made a victim.

No argument, unfavorable to our claim, can be derived from the concluding words of the limitation to Elizabeth's children—"after Elizabeth is done using or occupying it, and at Elizabeth's death."

There is nothing in this affecting the quantity or certainty of the estate limited to the children. It expresses no condition on which the estate is to take effect, or by which its duration is shortened. It is not the language of contingency. It is simply a statement of the time when the estate, already defined and limited, should take effect in its possession and enjoyment.

The authorities to this effect are numerous and conclusive.

1 *Jarman on Wills*, 727, et seq.
2 *Cruise Digest*, *295, § 79 to 86.
*Carver* v. *Jackson, ex dem. Astor*, 4 Peters, 90.

The testator was endeavoring to provide for the future, as far as he could see it. The first object of his bounty was his only and unmarried daughter. For reasons satisfactory to himself, he limited her estate to her life. His next care was for her children. The idea occurs to him

that she may not marry, or that marrying, she may not have children. That contingency he refers to, but provides that if it happen, and the estate limited to them vests, that it shall be the largest known to the law. He exhausts his own power and bounty upon them. He gives them all he can, the full estate in fee simple, the absolute right of holding and disposing.

In case the contingency he has referred to, does not happen—in case his daughter shall not have any child, to take the estate he has provided—he declares that the same estate shall go to his brothers and sisters.

That was all of the future Andrew Ferris saw, and all that he provided for. He did not contemplate the contingency that his daughter might have a child and outlive it. Such was not the usual course of nature. It is not strange it did not occur to him. He, therefore, made no provision against it.

Now let us turn to the language he has used to express the conditional provision for his brothers and sisters. It is, "*If my daughter, Elizabeth A., shall die without children then, and in that case, I give,*" *etc.*

It is perfectly clear, we assume, that this remainder depends upon the same contingency that affects the previous one, limited to Elizabeth's children. If the latter vests, the former cannot. If the contingency upon which the first limitation depends, does not happen, whereby that limitation is prevented from vesting, the second limitation takes effect and becomes indefeasible. The remainders are concurrent. They run together. When the first vests it absorbs the entire estate and nothing is left for the other. If it does not vest, then the contingency has happened which fixes and establishes the other. When Elizabeth's children take the fee, the testator's brothers and sisters can

find nothing for the devise to them to operate upon. If there are no children of Elizabeth to take the fee, then when the life estate falls, by her death, the fee must go somewhere, and the testator has devised it to his brothers and sisters.

There is then nothing inconsistent in the two limitations. They are perfectly harmonious. They do not interfere with each other. The estate is to go to the children in a certain event. If it does not go to them, by reason of the failure of that event, the same estate which would otherwise have gone to them, goes to the ulterior remaindermen. The same contingency affects and controls both. When the estate of the children begins, it is to run forever, to them and their heirs and assigns. The only doubt is, whether it shall ever begin. If it does not begin during the lifetime of their mother, or at the moment of her death, it can never begin at all; and if it does not, then the estate of the testator's brothers and sisters begins and continues forever.

Bearing this in mind, it is certain that the language used by the testator to express the event upon which the ulterior limitation shall take effect, must be *exactly the converse* of that employed to express the one upon which the previous limitation depends; in other words, *the event* is the same in both cases; if it falls out one way the children take; if the other, the brothers and sisters. And, applying this to the words used by the testator, we therefore find that the words, "*if my daughter, Elizabeth A., shall die without children,*" must mean the converse of the words used in the parenthesis in the preceding clause, "*if she shall have any heirs.*" In other words, that if in the sense of the latter words as used, Elizabeth *should have any heirs,* she shall not be considered as having, in the

sense of the words as used in the last clause, "*died without children.*"

This comparison of the two phrases conclusively confirms the argument already made, to show that the word "*heirs,*" in the parenthesis, was used as synonymous with "*children.*" They are used interchangeably not only in the same clause, but in different clauses, pointing to precisely the same event. The first limitation, then, means the same as if it were read, "*To my daughter Elizabeth's children and their heirs and assigns forever, if she shall* HAVE *any children.*" And, therefore, her *dying without children*, as spoken of in the last clause, means the same as if it read, "*if my daughter, Elizabeth A., shall die* WITHOUT HAVING HAD *children.*"

The phrase, "*shall die without children,*" considered by itself is always ambiguous. It may mean "*shall die without surviving children;*" that is, *without children living at a particular time;* but when it does, there must always be something in the context, or the circumstances, to determine what time is referred to; as it may be, living at the death *of the parent*, or at the death of *a stranger*, or at the death of *the testator;* and in determining between these different possible meanings, other things being equal, the period soonest to happen will be preferred, as hastening the vesting of the estate.

*In re Biddle's estate*, 28 Penn. Stat. R., 59.

It may, with equal propriety, mean "*shall die without having had children.*" Something must always be supplied to determine in which sense it is used. It conceals an ellipsis, fatal to the certainty of its meaning, which can only be furnished by the context, or a reference to the

circumstances of its use. One who has never had a child and dies, certainly dies without children; and one, who having had children, outlives them and dies, dies *childless* indeed, but not in every sense *without children*. Spoken with reference to one who, at the time of speaking, already has children in being, it manifestly means dying without surviving children. But spoken of one who, at the time, has had no child, and is unmarried, it more naturally means dying without having had children.

*Goodtitle* v. *Billington*, Douglas, 753.

This is well illustrated in the case of *De Haas* vs. *Bunn*, 2 Barr Rep. 335, where there was a devise of the moiety of a house and lot to the testator's daughter for life, and from and after her death to such child or children *as she now hath*, or hereafter may have, their heirs and assigns, as tenants in common, provided "*If my said daughter shall happen to die without issue, that then and in such case the same shall go to my said son, John Phillip De Haas, his heirs and assigns forever.*"

A son of the testator's daughter was living when the testator made his will and survived him, dying afterward in his mother's lifetime, without issue. His mother died afterward, without issue, surviving her.

C. J. Gibson said: "The limitations to the daughter's children, and to her brother in the event of her death without issue, were not concurrent, contingent remainders, depending on a contingency with a double aspect, on the happening of which, the one or the other would exclusively vest, *because the daughter's son was born in the lifetime of the testator,* and as the fee was limited to him, neither as an uncertain person, nor on the happening of an uncertain event, it vested in him at the testator's death, so that there

could be no further limitation of it, except by executory devise."

In the case of *Pinbury* v. *Elkin*, 1 Peere Williams, 564, Lord Chancellor Parker said that "the words [dying without issue] had several senses: as, first, a legal sense, when there was a failure of issue of tenant in tail, so as to entitle the remainder-man a reversioner to a *formedon* in remainder or reverter; which is whenever there is a failure of issue of the body of tenant in tail.

"Secondly. Another sense of dying without issue was, if the party *died without ever having had issue;* and that was the sense put upon these words in the case of *Brett* v. *Pildridge*, cited in 1 *Sidf.*, 102, and 1 *Keb.*, 248, 462, when a man gave a portion with his daughter in marriage, and the husband covenanted with his father-in-law to repay him £500, part of the portion, if the daughter should die without issue within two years after the marriage; the daughter had issue within two years, but she, and afterward her issue, died within the two years; and the case coming on in chancery, was referred to the opinion of four judges, who all held that the father should not have any of the portion back again, in regard there *once* had been issue of the marriage.

"Thirdly. But, by the third sense of a person's dying without issue, is intended, *without having issue at the time of his death;* and in this sense, the words [dying without issue] shall be taken in the principal case."

Here, then, we discover the office of the parenthesis employed by the testator in this will, in the limitation to his daughter's children. It was to prevent any uncertainty in his meaning, that might otherwise have arisen from the use of the subsequent ambiguous phrase, descriptive of his daughter's dying without children—to make it certain, that if there should be born to his daughter any child, his estate should vest in that child and its heirs forever—to exclude

the very conclusion that is now sought to be drawn against this result.

The first limitation of the remainder in fee, is to the children of the testator's daughter. They take by purchase, and not by descent. But no provision is made for the descendants of those children, except through them—except as heirs of the children. The children of the children would take as heirs of the children, inheriting from them, and not as purchasers. This is the plain meaning of the testator. The rule of law, or rather of construction, is equally clear, that "grandchildren" would not be permitted to take as purchasers under a devise to "children."

2 *Jarman on Wills*, 70.
*Wyld* v. *Lewis*, 1 Atk. R., 432.
*Tenny* v. *Agar*, 12 East. R., 253.
*Doe* v. *Webber*, 1 Barn. and Ald. R., 713.
*Hawley* v. *Northampton*, 8 Mass. R., 1, 41.
*Parkman* v. *Bowdoin*, 1 Sumner R., 370.

Suppose, then, that the child of Elizabeth had lived to have issue of its own, and then died, living its mother, and Elizabeth had then died, leaving surviving grandchildren, but no surviving child.

Upon the construction claimed on the other side, Elizabeth would, in that case, have died without children—that is, without children surviving her; and, of course, the brothers and sisters of the testator would make (and with equal propriety) the same claim they urge now, that the remainder in fee, limited to them, had vested.

And yet, it is perfectly manifest that it was the intention of the testator that all the heirs of his daughter's child should take the estate in preference to his brothers and sisters. He has expressly so declared. He gives the estate to his daughter's children, and to their heirs and as-

signs. This intention certainly must not be defeated. But there is one way alone by which it can be effectuated. That is, to construe the will so as to vest the first remainder in fee on the birth of a child. That alone secures the paramount purpose of the testator. That done, all the rest follows. The children are provided for; their descendants and heirs are provided for.

In the case as it actually happened, the estate, vesting in the child on its birth, descended, according to the statute, or rather ascended, upon its death, to its mother, as its heir. It doubtless did not occur to the testator that the mother could be heir to her own child. Perhaps, if it occurred to him, it was so remote a contingency, he did not think it necessary to provide for it. The fact is, at least, that he did not provide against it. He makes no distinction whatever between the heirs of his daughter's children. If any one standing in that relation could take, then every one answering the description could. No one could take as heir of the child unless the child died seized of a vested interest. Its own child, if it had lived to have one, who survived it, could not have taken for any other reason. But if it died seized of a vested interest, then the mother took as heir.

The supposed difficulty in the construction of this will is imaginary. It is fictitious and artificial. It has been created for the purpose of meeting what it is conceived would have been the intention of the testator as to the disposition of his property, if he had foreseen the event as it has in fact happened. It is urged that the construction we claim takes the property out of the testator's family into that of a stranger; while the contrary one preserves it for the testator's own.

It ought to be a sufficient answer to this, to say that we

have no concern with what might have been the testator's intention, in reference to events he neither foresaw nor expected. Our sole business is to ascertain what intention he has in fact declared in the circumstances in which he was placed.

It is unsafe and inadmissible to resort to the light of subsequent events to explain the meaning of a will. We are all very wise after the fact; but should endeavor *not to be wise above what is written.* The temptation to gratify our own will, by proving it to be that of the testator, is dangerous and great. The soundest judicial authorities unite in condemnation of the resort to which an appeal is here made. We must put ourselves in the situation of the testator; see only with his eyes, think with his understanding, and dispose as he has declared. In *Doe d. Sams* v. *Garlick*, 14 Mees. and Welsby, 701, Baron Parke observes that difficulties have arisen from confounding the testator's *intention* with his *meaning.* "*Intention* may mean what the testator intended to have done; whereas the only question in the construction of wills, is on the *meaning of the words.*"

But it is not true that the construction we contend for, takes the testator's property out of his family. It vests the estate in the child of his daughter—in his grandchild. That is all. Accident and the law have done the rest. Contrary to the common course of nature, the mother outlived her child, and the law, not we, made her its heir. She made her will. Her affection for her husband was stronger than for her father's brothers and sisters. That is not strange; but if it were, it is not the fault of our construction of her father's will. She accordingly left all her property to her husband, and it descended, on his death, to his heirs.

Now, if Andrew Ferris had died intestate, the law in that event being his will, would have lodged the title just where we now insist it is. It would have descended to his daughter in fee, and she would have disposed of it by will or by deed to whomsoever it pleased her. But for her will, in either case, upon our construction, it would have gone to Andrew Ferris' brothers and sisters, as heirs at law of his daughter. It is, in fact, a struggle on the part of the remote and collateral heirs to wrest the estate from the disposition of the heir, who was immediate and direct. It is an indirect attempt to set aside the will of Elizabeth, by forcing the construction of her father's.

The construction of Andrew Ferris' will, which we claim is required by the plain meaning of his language, is favored by the rules and policy of the law. According to that construction, the moment Elizabeth's child was born, the fee simple in the estate vested; according to the opposite construction, the contingency is prolonged until her death. The law, it is said, favors the vesting of estates, and will rather refer words otherwise importing contingency, to the time of the enjoyment of the estate in possession, than to consider them as affecting its nature or quality.

1 *Jarman on Wills*, 726.
*Doe ex dem. Comberbach* v. *Perryn*, 3 Term R., 494.
*Olney* v. *Hull*, 21 Pick., 311, 314.
*Bowers* v. *Porter*, 4 Pick., 198.
*Ferson* v. *Dodge*, 23 Pick., 468.
*Dingley* v. *Dingley*, 5 Mass., 535.
*Moore* v. *Lyons*, 25 Wendell, 119.
*Doe ex dem. Long* v. *Prigg*, 8 Barn. and Cress., 231.
*Poole* v. *Bott*, 17 Eng. Law and Eq. R., 13.
*Carver* v. *Jackson ex dem. Astor*, 4 Peters, 90.
*Doe ex dem. Barnes* v. *Provoost*, 4 Johns. R., 61.
*Garnet* v. *Lyner*, 31 Penn. State Rep., 94.

We have thus far argued the proper construction of

Andrew Ferris' will, as if it were a case of first impression, as if it were the first instance in judicial history of the attempt to create estates by the use of such language. We have resorted merely to the words he has used to find out his meaning, without reference to previous adjudications upon similar phrases.

The fact is, similar language has been repeatedly used, and its effect many times judicially declared. Such judicial declarations must be regarded as very important in the settlement of such a question. The opinions of distinguished jurists, both English and American, upon the mere question of the meaning of the language, are certainly entitled to weight. But when, by a long course of concurring decisions, that meaning has become fixed and known, the presumption that the language is subsequently used with reference to its established construction becomes so strong as to entitle the rule which has been adopted, to be considered one of property and not merely of construction. On this subject Justice Story, in the case of *Lillibridge* v. *Adie*, 1 Mason's Rep., 234, says:

"We are at liberty in last wills and testaments to effectuate the intention of the testator, if by law it can be done. But in ascertaining what that intention is, the construction which has been put upon like words, and the artificial rules by which it is sifted and fixed in the authorities, are to be our inflexible guides where they distinctly and pointedly apply. We are not permitted to indulge in conjectures, however plausible, as to the private intention of the party, when the law has already pronounced its own mode of investigating and deciding it."

Let us now turn to the adjudged cases:

*Goodright ex dem. Docking* v. *Dunham*, 1 *Doug. Rep.*, 264.

This was an ejectment and turned upon the construction of a will, in which the testator gave the premises to his son, Jeffrey Laming, for his life, and after his death unto all and every his children equally and to their heirs, and in case he dies without issue, he gives the said premises unto his two daughters and their heirs, equally to be divided between them.

Jeffrey suffered a recovery of the premises and conveyed to the defendants. He died afterward *without having ever had any issue.* The lessors of the plaintiff were the daughters mentioned in the will.

Lord Mansfield in deciding the case for the defendants, said:

"The words '*and in case he dies without issue,*' being tacked to the preceding clause, must mean the same thing as '*and in case he dies without children.*' But for the defendants it was contended that both the limitations over were contingent remainders in fee; and, for the plaintiff, that the first was a contingent remainder in tail, and the second a vested remainder in fee. None of us have any doubt but that both are contingent remainders. There are no expressions to restrain the sense of the word 'heirs' in the limitation to Jeffrey's children. *If Jeffrey had children, the testator meant to give them an estate in fee. Upon the contingency of his not having any, he meant the estate to go immediately to his daughters in fee.*"

*Loddington* v. *Kime*, 1 *Salk.*, 224, S. C.; Ld. Raym., 203.

This case was that of a devise to A. for life, without impeachment of waste; and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B. and his heirs forever.

It was held that the remainder limited to the issue of

A., was a contingent remainder in fee, and that the remainder to B. was a fee also, but contingent and not vested.

"But those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that there are remainders contemporary and expectant one after another.

It was accordingly decided that the recovery suffered by A. (who died without issue) destroyed both remainders.

The case of *Carter* v. *Barnardiston*, 1 Peere Wms., 504, was a continuation of the same dispute, and the above decision was confirmed in the House of Lords, on an appeal concerning the same devise in the latter case. 2 *Bro. P. C.*, 1.

The same point was decided in the same way, upon a similar devise, in the case of *Doe ex dem. Browne* v. *Holme & Longmire*, 3 Wilson, 237, 241; 2 Blacks., 777; and the rule of construction is very clearly stated in the note to the case of *Doe ex dem. Fonnereau* v. *Fonnereau*, 2 Douglas, 505.

The case of *Doe ex dem. Comberback* v. *Perryn*, 3 Term R., 484, is expressly to the point. The limitations in the will, in that case, were to the testator's niece, wife of his nephew, for life; remainder to trustees to preserve contingent remainders, remainder to all and every the children of Dor. Comberback (his niece), begotten, or to be begotten, by his nephew, James, *and their heirs forever;* remainder to trustees to preserve contingent remainders, and from and after the decease of the survivor of James Comberback and Dor., his wife, *without issue as aforesaid,*

to and among all and every the children of his nephew, Roger Comberback, and of B. Perryn, etc.

James Comberback and Dorothy, his wife, were married in the lifetime of the devisor, but had not any issue at the time of his death; though subsequently they had children, all of whom they survived, and who died without issue.

In deciding the case, Lord Kenyon said: "The clear intent of the devisor was, that the children of Dorothy, if any, should take a fee; and if she had no children, then that the remainders over should take effect; but Dorothy had children, by which the limitations over were defeated. Therefore the title is properly derived to the lessors of the plaintiff. *As to what the devisor would have said, had he looked to the event of Dorothy's children dying in the lifetime of their parents, it is unnecessary to consider.*"

Ashhurst, J., said: "Wherever a fee is created by positive words in a will, it can only be defeated by subsequent words equally plain, or by necessary implication. The operation of this will is, that the limitation to Dorothy's children was contingent till they were born; but it became vested on the birth of the first child, subject, however, to be diminished in quantity as other children of Dorothy should be born. And on the birth of Dorothy's first child, the subsequent limitations were defeated. Then the only question is, whether there is anything in the will to show that the children of Dorothy *must necessarily be confined* to children living at the time of the decease of their parents; but no words are used in the will from which such an inference must *necessarily be drawn;* and it is clear, by the subsequent part, that if such had been the devisor's intention, he knew how to express himself."

Bulles, J., said: "The words '*dying without issue*' have frequently been held to mean, '*without issue at the time of the death of the party*,' in cases of personal property, but not in limitations of freehold estates. In

*Fonnereau* v. *Fonnereau* (Douglas, 486), Lord Mansfield asked whether there was any such determination in the case of real property, and the counsel agreeing that there was none, the judgment of the court, in that case, proceeded upon that ground. The reason why this has not been decided in limitations of freehold estates is, that courts of law always have been in favor of the vesting of estates; and therefore on such a limitation as the present, they have said that the estate shall vest on the birth of a child, and without waiting for the death of the parent—which rule is not attended with any inconvenience to the children, because, when the estate is limited to a number of children, it shall vest in the first, and afterward open for the benefit of those who shall be born at a subsequent period. But if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to grandchildren; for, if a child were born who died in the lifetime of his parents, leaving issue, such grandchild could not take, which could not be supposed to be the intention of the devisor."

*The King* v. *The Marquis of Stafford, and others*, 7 East. R., 521.

In this case, the testator devised real estate to his only daughter, Rebecca, for life; and from and after her decease, unto his granddaughter, Rebecca, for life; remainder to trustees to preserve contingent remainders; remainder to the issue of the said Rebecca (the granddaughter), in such shares, parts, etc., as the said Rebecca should by will appoint, and, in default of such appointment, to the use, etc., of all the children of the said Rebecca (the granddaughter), and their heirs; and in default of such issue, to all the other children of the testator's daughter, Rebecca, and their heirs; and in default of such issue, to the testator's right heirs forever.

The testator died, leaving his daughter, Rebecca, and

his granddaughter, Rebecca, and two other grandchildren. Rebecca, the granddaughter, made no appointment, and died, leaving an only child, who died an infant, and without issue. The prosecutor was the heir-at-law of that infant.

Lord Ellenborough, in deciding the case for the prosecutor, said: "Had the testator been told that if he gave the children of his granddaughter, Rebecca, a fee, and they should die during their minorities, that his estate would go to the eldest son of his daughter, Rebecca, to the exclusion of her other children, it is not improbable but he might have said, 'that is not my intent.' But there is nothing in this will to enable us certainly to say whether such event were or were not in his contemplation. If it were, may it not be fairly concluded, by his not expressly providing for it, that he thought the event not likely to happen, and on that account, not worth his while to provide against; or, supposing him not to have contemplated it at all, why might not his intention be to give his granddaughter's children a fee, if she had any; and, if she had none, then, in such event, the other children of his daughter, should take the estate? Thus it would stand if the devise to the children of his granddaughter, Rebecca, were an immediate devise."

The case of *Burnsall* v. *Davy*, 1 Bosanquet & Puller R., 215, is to the same effect, and was followed by *Crump* v. *Norwood*, 7 Taunton R., 362.

They were followed by the case of *Doe dem. Herbert* v. *Selby*, 2 Barnewall & Cresswell, 926.

Bayley, J., said: "It is not contended that George took an estate tail; and, indeed, *Goodright* v. *Dunham*, shows that he took for life only, and that his children would take as purchasers by way of remainder, and they would take in fee. It has been contended that the ultimate devisees took either by way of executory devise or

vested remainder. But it is clear, that where a devise may operate as a contingent remainder, it cannot be considered an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that may be an executory devise; but if a fee is limited in contingency, and upon failure of that, the estate is given over, that is a contingency with a double aspect; and if the estate vests in the one, it cannot in the other. * * * *

"Upon the whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate."

*Right ex dem. Shortridge, et al.* v. *Creber*, 7 *Barnewall & Cresswell*, 866.

In this case, there was a devise in trust, for the benefit of the testator's daughter for life, and from and after her death, "unto the heirs of the body of his daughter, share and share alike, their heirs and assigns forever."

At the time of the death of the testator, the daughter had one child, and afterward had eleven others.

It was held that the words "heirs of the body," in this will, meant *children*, and that the child born before the testator's death, took a vested remainder in fee, subject to open and let in those who might be born afterward.

Several of the children died in their mother's lifetime, without issue; but it was nevertheless held that they had become entitled, under the will, to a vested estate.

Bayley, J., says: "The several cases cited, as to the application of the rule "*nemo est hæres viventis*," do not apply to the present case, because in those cases there was nothing to show that the testator intended to use the

words 'heirs of the body' in any other than the strict legal sense; but when it can be collected from expressions in the will, that those words are used in a different sense, as a designation of a person, then the remainder vests, notwithstanding the general rule that '*nemo est hæres viventis*,' as when the limitation to the heirs special was qualified by the words '*now living*' (*Burchett* v. *Durdant*, Carth., 154); or some other circumstances have appeared in the will, to manifest the testator's intention that the estate should vest: *Long* v. *Beaumont*, 1 Peere W., 229; *Goodright* v. *White*, 2 Black., 1010. I think that there is, in this case, sufficient on the face of the will to show that the words '*heirs of the body*' were used to denote children, and, therefore, that it was the intention of the testator that the remainder should vest in the first-born child, subject to open and let in the other children as soon as they came into *esse*."

See, also, *Gretton* v. *Haward*, 6 Taunt., 94.

To the same effect are the following cases:

*Doe d. Tooley* v. *Gunnis*, 4 Taunt., 313.
*Doe d. Liversage* v. *Vaughan*, 6 Sim., 358.
*Ashley* v. *Ashley*, 1 Dowl. & Ryl., 52, S. C.; 5 B. & Ald., 464.
*Denn d. Briddon* v. *Page*, 3 Durn. & E., 86, *n*; 11 East., 603, *n*.
*Hay* v. *Earl of Coventry*, 3 Durn. & E., 83.
*Doe d. Phipps* v. *Lord Mulgrave*, 5 Durn. & E., 320.
*Foster* v. *Romney*, 11 East., 594.
*Goodright d. Loyd* v. *Jones*, 4 Mau. & S., 88.
*Purcell* v. *Purcell*, 2 Drury & Warren, 219, *n*.
*Ginger d. White* v. *White*, Willes, 348.
*Pye* v. *Linwood*, 6 Jurist, 618; 2 Jarman on Wills, 420, *n*.
*North* v. *Martin*, 6 Simon R., 266.

In commenting on these cases Mr. Jarman (2 *Jarman on Wills*, 372) says:

"In this state of the authorities, then, the proposition seems undeniable, that the phrase '*in default of such issue*,'

'*for want of such issue*,' or '*on failure of such issue*,' following a devise to any class of issue, or even to any individual child, or other descendant, is simply and exclusively referential, and does not enlarge, *or in any manner affect, any of the prior estates.*

"It is well settled, also, that words importing a failure of issue (without the word *such*) following a devise to *children*, in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large."

The application of this rule of construction, in the present case, may, then, be stated thus:

The final limitation to the brothers and sisters of the testator, "*if my daughter, Elizabeth A., shall die without children*," does not, in any manner, affect the previous limitation of the fee simple to those children; does not create any new contingency; does not postpone the vesting of the prior estate, nor divest it on any subsequent event: but simply means that if the prior limitation shall not take effect, by the vesting of the estate thereby created, according to its own terms, then the subsequent limitation shall be substituted for it.

The case of *Malcolm* v. *Taylor*, 2 Rus. and Mylne, 416, is fully and strongly to this point.

In that case, the testatrix devised real and personal property to Elizabeth Goodin Taylor and Maria Taylor for their lives, and after the death of either, to the survivor for life; and after the decease of the survivor, unto such of the children of Maria Taylor as she should appoint; and in default of appointment, the real estate and certain descriptions of the personalty, to be equally divided among the said children, their heirs and assigns; and if but one such child, then the whole to such one child, his or her heirs and assigns, etc.; and in case the said Maria Taylor shall die without issue of her body, lawfully begotten, then,

after the decease of the survivor of the said E. G. Taylor and Maria Taylor, the said real estate unto and among all and every the children of Anna Susanna Watson Taylor, and their heirs and assigns, etc.

Maria Taylor survived E. G. Taylor, and died without ever having been married.

In deciding the case, the Master of the Rolls said:

"As applied to the real estate, the expression '*dying without issue*,' is to be construed *a dying without having had issue;* because, as a child of Maria Taylor would take a vested interest upon its birth, the limitation over can have no other object than to provide for the failure of children.

"The expression '*dying without issue*,' as applied to the funded property, must, therefore, either mean a dying without such issue as would take by force of the prior limitation, or a general failure of issue. It is a reasonable intendment that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This is the plain intention of the testatrix with respect to the real estate; and it is to be supposed, where real and personal estate are given together, that the testatrix had the same intention with respect to the funded property and the real estate."

On appeal, the decree of the Master of the Rolls was affirmed by the Lord Chancellor. After stating the case, the report of his judgment says:

"In these circumstances, no question is made upon the devise of the plantation. His honor held that it was given to Maria Taylor for life, with a power of appointing to her children, and in default of appointment, to her children, share and share alike, in fee; and if she have no children, then to Mrs. Watson Taylor's children; and it is clear, *that if Maria Taylor had children, their interest vested at their birth.*"

*In re Tookey's trust; in re Bucks Railway Co.*, 21 Law J. Rep. (N. S.) Chanc., 402, S. C.; 11 Eng. Law & Eq. R., 60.

In this case, the testator devised an estate to his daughter for life, and after her decease, to all and every the children of the body of his daughter, lawfully begotten (*in case she should leave more than one child*), their heirs and assigns forever, as tenants in common: but in case his daughter should have only one child, then he devised the estate to such one child in fee; but in case his daughter should die *without leaving any issue of her body*, then he devised the estate to all such children of his body as he should leave, or have living at the decease of his daughter, in fee.

The testator's daughter had two children, both of whom died during her life.

It was held that these two children took *absolute and devisable estates*, in remainder, under the will.

See, in support of this, *Maitland* v. *Chalie*, 6 Madd., 243; *Woodcock* v. *The Duke of Dorset*, 3 Bro., C. C., 569; *Powis* v. *Burdett*, 9 Ves., 428; *Harrison* v. *Foreman*, 5 *Vesey*, 207; *Browne* v. *Lord Kenyon, et al.*, 3 Madd., 410; *Sturgess* v. *Pearson*, 4 Madd., 411.

A very instructive case, in support of these views, is that of *Baker* v. *Tucker*, 14 Jur., 771; 2 Eng. Law & Eq. R., 1, an appeal in the House of Lords from the Irish Chancery. Lord Brougham, in delivering his opinion, says:

"Now, I take it that it is clear, that a gift over may undeniably affect the preceding gifts, if the words be inconsistent with those preceding gifts, taking effect according to the terms used in describing those preceding gifts. But in this will, it appears to me there is no such incon-

sistency as to let in that modification between the terms of the gift over and the terms of the preceding gifts. All the children of Julia Baker are provided for: first, the sons, then the daughters, and then, in default of issue—not on *failure of issue*, but for want of such issue—to the testator's right heirs: that is to say, *if the prior gifts do not take effect.*"

The most recent case on this subject, in England, is *Foster* v. *Hayes*, first determined in the Court of Queen's Bench, 17 Jur., 1050; 22 Law J. Rep. (N. S.), Q. B., 329; 2 El. & Bl., 27; 20 Eng. Law and Eq. R., 72; and on writ of error in the Exchequer Chamber, 30 Eng. Law & Eq. R., 267.

The limitations of the will, and the circumstances of the testator's situation, are substantially the same as in the present case, and the decision is expressly in point.

In pronouncing judgment, in the first-named court, Lord Campbell says:

"We are of opinion, that, under the will of William Harding, Elizabeth Harding Hayes, on her birth, took a vested remainder in fee in the lands in question, subject to the life estate of her father, Matthew Hayes.

"There seems to us to be no doubt whatever, that this would be the effect of the limitations in favor of Matthew and his children, irrespective of the proviso which is mainly relied upon by the counsel for the plaintiff.

"No words could have been employed by the plaintiff better adapted for that purpose than those found in the will, down to the limitation in favor of the sons and daughters of the testator's brothers and sisters, '*for default of such issue;*' and '*for default of such issue,*' according to various authorities which were cited, must mean, '*for default of Matthew having had no child in whom the remainder in fee should vest.*' * * *

"The proviso used the expression, '*in case either of my*

*grandsons should happen to die without issue of their bodies, lawfully begotten;'* but we think this must mean '*such issue*' as is before specified, and introducing no devise inconsistent with the prior gift to the children of the grandson and their heirs, leaves the remainder in fee simple to vest in the child of the grandson on its birth."

The Court of Exchequer Chamber, after reviewing the principal authorities already cited by us, concludes its judgment with these remarks:

"With a rule of construction so clear and so fully recognized by the highest authorities, it is hardly open to us to speculate upon the intention of the testator as to the devolution of his property. But, if we were to indulge in any such speculations, we should be disposed to say that the testator intended to give the estate in fee to Matthew Hayes' children, if he had any; and if he had not, then to the other grandson's children in fee; and if neither grandson had a child, then to the children of his nephews and nieces in fee. It is highly probable, however, that he did not contemplate what has, in fact, occurred—namely, Matthew Hayes having a child which died in infancy before its father, and, therefore, did not guard against such a contingency. He assumed, doubtless, that the children would survive their parents, which is the natural and ordinary course of events; and if Elizabeth Harding Hayes had been alive at her father's death, it would have appeared quite natural and proper, and according to the testator's intention, that she should have taken the estate in fee. He has used language giving an estate for life to Matthew Hayes, and an estate in remainder in fee to his children, in the plainest terms, and in the most perfect technical form of words known to lawyers. And as we think the authorities abundantly show that the words of the proviso, importing a failure of issue to Matthew Hayes, effect no alteration either in the prior life estate of Matthew Hayes, or the estate in fee of his children, it follows that the estate vested in Elizabeth Harding Hayes in fee,

and descended to the defendant as her heir; and that consequently the judgment of the Court of Queen's Bench was right, and must be affirmed."

Mr. Fearne (*Cont. Remainders, pp.* 373, 374) states the principle of these decisions thus:

"However, we are to remember, that although a fee cannot, in conveyance at common law, be mounted on a fee; yet two or more several contingent fees may be limited merely as substitutes or alternatives, one for the other, and not to interfere; but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect. Thus, in the above-cited case of *Loddington* v. *Kime*, it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from, the effect of the former, but by way of substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. For if A. had issue male, the remainder was to vest in that issue in fee; but if A. had no issue male, then it was to vest in B. in fee: and these were limitations of which the one was not expectant upon, and to take effect after, the other, but were contemporary—to commence from the same period, not, indeed, together, but the one to take effect in lieu of the other, if that failed."

The English decisions to which we have referred, have been followed, in this country, in the following cases:

*Miller* v. *Macomb*, 26 Wend., 229, S. C.; 9 Paige, 265.
*Carpenter* v. *Schermehorn*, 2 Barb. Chy., 314.
*Wolfe* v. *Van Nostrand*, 2 Comstock, 436.
*Wight* v. *Baury*, 7 Cushing, 105.
*Carver* v. *Jackson ex dem. Astor*, 4 Peters, 90.
*Sisson* v. *Seabury*, 1 Sumner, 243.
*Hannan* v. *Osborn*, 4 Paige, 336; 4 Kent's Com., 200.
*Claggett, adm'r of Beanes* v. *Worthington*, 3 Gill., 83.

*Williams* v. *Leach*, 28 Penn. State R., 89.
*Minnig* v. *Batdorf*, 5 Penn. State R., 503.
*Isbell* v. *Maclin*, 24 Alabama, 315.
*De Haas* v. *Bunn*, 2 Barr., 335.

Before leaving the consideration of these cases, and the rule established by them, it is highly necessary for the purpose of avoiding confusion of thought, to distinguish them carefully from those decisions usually referred to, as establishing and illustrating the rule of construction, whereby a limitation over, upon the failure of issue of the first taker, is held to be void as too remote.

"This rule," says Lord Cottenham, then Master of Rolls, in the case of *Tarbuck* v. *Tarbuck*, 2 Jarman on Wills, 376, "has been adopted for the purpose of giving effect to the general intent of the testator, manifested in his devises over, depending on a failure of issue generally, in order to give a chance, at least, of succession to persons who, though they cannot claim under a particular gift, are included in the general description of issue. That rule does not apply when this object is not to be attained, *and amongst the exceptions is the very case which occurs here: namely, a gift to A. for life, with remainder to the children of A. in fee; that is, the children of A. in fee generally, and a gift over on the death of A. without issue*, which means, *such* issue, that is, *children*. This was the case of *Goodright* v. *Dunham*, which is precisely in point on this subject. In such cases, the general term 'issue' is construed to mean that particular description of issue before specified; namely, children."

It is very plain, indeed, that the rule as to the validity of limitations, depending on the general failure of issue of the first taker, is not involved, in the least degree, in the class of cases, of which the one at bar is an example; and this appears with great distinctness from the terms of the

English Statute, 1 Vict., c. 26, § 29, abolishing the rule, previously in force, as to these limitations.

It provides "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift, being without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise; *provided that this act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate, by a preceding gift to such issue.*'"

In relation to this statute, Mr. Jarman, in his Treatise on Wills, Vol. II, page 296, of the second American edition, remarks as follows:

"It is evident, therefore, that the question whether words importing a failure of issue refer to the objects of the preceding devise, may still arise under wills, that are within the recent enactment; and if this question be decided in the affirmative the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the previous devise, the result now will be widely different, for instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and consequently can never,

under any circumstances by their own intrinsic force, have the effect of creating an estate tail by implication; so that to wills made or republished since the year 1837, no scope will be afforded for the application of the doctrine of the cases of *Doe* v. *Halley*, *Parr* v. *Swindalls*, and *Doe* v. *Gallini*, to the discussion of which so large a space has been devoted.

"The effect of holding the words in question *not* to refer to the issue, who are the objects of a preceding devise, will be to render the estate of the children, conferred by such devise, determinable on the event of the parent dying without leaving issue living at his death, as in the case of *Hutchinson* v. *Stephens* (1 Keen, 240), which is a result that ill accords with probable intention. Such a case, however, can only occur where the devise to the children, or any other class of issue, gives estates in fee, as it would under wills which are subject to the new law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the new law, increased motive for adhering to the principle of the cases of *Goodright* v. *Dunham* and *Malcolm* v. *Taylor*, which, it will be remembered, authorize the proposition that, where a devise to children in fee is followed by a devise over, to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue, refer to the children or other issue, who are the objects of the prior devise, which principle would, it is conceived apply to devises embracing any other class of children, as sons or daughters.

"For instance, if lands are devised to A. for life, with remainder to his sons, and if A. should die without issue, then to B., each son of A., under the original devise, would immediately on his birth take a vested remainder in fee simple, in his own aliquot share; and, if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation, of course, would not disturb or affect such vested remainder; but if the words in ques-

tion were adjudged not to bear this construction, but to point to issue of every degree living at the death of A., they would subject the vested estate of the sons of A. to an executory devise, to take effect in the event of A. dying without leaving issue *surviving him*, a result which, it is conceived, the courts, in applying the new rules of construction, will not hesitate to reject, in deference to the authority of the cases just referred to. The enactment which makes a devise pass the fee simple without words of limitation, will, it is obvious, greatly extend the application of the doctrine of *Goodright* v. *Dunham* and *Malcolm* v. *Taylor;* and, in this respect, seems to operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise."

It is of the greatest importance to a true conception of the reasons, on which a proper determination of this case should rest, to keep in mind this distinction.

For, the argument opposed to us, is, that the phrase "*die without children*," or other equivalent expression, must necessarily mean, either, 1. A dying after an indefinite failure of descendants; or 2. A dying without children living at the time of the parent's death; and, that the former is always, when possible, to be avoided and rejected, as destructive of the testator's intention, and of the expressed limitations of his will, dependent on an event so remote as to bring them within the prohibitions of the policy of the law.

And the fallacy of it resides in this, that it begs the whole question, by assuming that what we maintain, upon this will, to be its actual and necessary meaning, cannot possibly be; overlooking the whole range of cases we have cited, and the principle on which they are grounded, by which the phrase in question, used as here, to introduce

an ulterior limitation, after a prior limitation in fee to the children themselves, is held to declare that the second limitation shall take effect only in the event the first does not; and that, in such case, the words, "*die without children,*" naturally and necessarily mean, "*die without having had children, in whom the estate, by the prior limitation, could vest.*"

It follows, that the rule as to the validity of limitations, dependent on "*dying without children,*" or other equivalent expression, as being too remote, and the arguments as to whether the phrase shall be construed to mean an indefinite failure of issue, or a failure of issue at the time of the death of the first taker, *only apply to those cases in which there is no intermediate limitation of the estate to the children or issue* referred to in the phrase.

This distinction will reconcile all the adjudications on the subject.

2 *Jarman on Wills*, 361.
*Ellicombe* v. *Gompertz*, 3 Myl. & Craig, 153.

It is clear, therefore, that the cases of *Morgan* v. *Morgan*, 5 Day, 517; *Harris* v. *Smith*, 16 Georgia Rep., 545; *Anderson* v. *Jackson*, 16 Johnson Rep., 382; *Daniel* v. *Thompson*, 14 B. Monroe, 662, and many similar, are not authorities against the rule for which we contend. In no one of these cases was there a limitation in fee of the estate to the children of the first taker for life, as here, and a limitation over in default of them. In all of them, on the contrary, the limitation to the first takers was in fee, and there was no limitation to their children or issue as purchasers at all; and the principal argument in them all, against the construction invalidating the ulterior limitation as too remote, depending on the indefinite failure of issue, was the absurdity of supposing that the testator intended

to create an estate tail in the first taker, when the policy of the law, in this country, had prohibited the creation of such estates. So that, in the case of *Daniel* v. *Thomson*, 14 Ben. Monroe, p. 683, the court says expressly:

"We reject those cases in which the first devise was for life, as not directly applicable to a will in which the first devise is in fee, because there is nothing in the devise for life to satisfy the inference in favor of the issue, arising necessarily from making the devise over depend upon the failure of issue of the first devisee, which would not only be useless, but unaccountable, unless it was intended that his issue, if any, should take after his death," etc.

And in none of the opinions pronounced in these cases is the line of cases cited by us referred to as applicable there, or the ground on which they proceed, disputed.

We come now to a consideration of the case of *Parrish's heirs* v. *Ferris, et al.*, 6 Ohio State Rep., 563—a judicial decision by the Supreme Court of Ohio, of the same questions involved in the present suit. Three claims, with reference to it, may be made:

1. That it has the authority of a precedent adverse to us.

2. That it furnishes a binding rule of decision for the Federal Courts, as being a declaration, by the highest State tribunal, of a rule of property.

3. That the judgment rendered in the case, bars the present action by way of estoppel.

We deny that it is entitled to regard on any of these grounds.

1. It has no authority as a precedent, because it is wrongly decided, upon a mistaken view of the nature of

the case, and a complete and thorough misconception of the rules of law applicable to a right judgment in it.

This appears very plainly indeed from the syllabus of the case, which we are informed, in the prefatory note to the volume, by the reporter, is intended to be a statement of the extent of the concurrence in the opinion on the part of the other members of the court.

The syllabus states "that, where there is a devise in fee to A., but if he '*die without heirs*,' or '*without children*,' or '*without issue*,' then to B. in fee, the words 'if he die without issue,' or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of A., unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes; and if A. have no children or issue living at the time he dies, then B. takes under such devise."

The proposition of law thus stated, may or may not be true. Whether true or false, we have no quarrel with it. The material matter is, that it has nothing in the world to do with the settlement of the question now in controversy.

In the actual case, there was no limitation in fee to A: it was a devise to A. for life, with a remainder to her children, their heirs and assigns forever; remainder over, in case A. should die without children.

To have met the real case, adversely to our claim, the court should have declared, that when there is a devise to A., the testator's unmarried daughter, for life; remainder in fee to her unborn children; remainder over, in case she die without children—the remainder over is not intended to be a substitute for the limitation to the children of his daughter, in the event that none are born in whom the fee can vest; but that the entire remainder in fee of the estate

is contingent until the death of the daughter, vesting at that time in her surviving children, if any; if not, in the ulterior remainder-men; or vests on the birth of a child, subject to open and let in after born children, but subject to be divested as to any who may die in the lifetime of the mother, and in case all so die, then, at the mother's death, to shift to the ulterior remainder-men.

It thus appears that the Supreme Court of Ohio has decided the case on a statement which not only ignores, but actually omits, the whole devise under which alone we claim! The performance of the play of Hamlet, with the part of the Prince of Denmark left out, is the only thing to be compared with it.

But this is not all. The court has not only left out that part of the will under which alone we did claim, but has actually set up for us a fictitious claim, which we never made for ourselves, nor dreamed of making.

"It is claimed," says the judge, who pronounced the opinion, p. 574, "by the plaintiffs, that the fourth item of the will, '*if my daughter, Elizabeth A., shall die without children, then and in that case I give and bequeath said lands to my brothers and sisters, their heirs and assigns forever, after the death of Elizabeth A. as aforesaid,*' is a limitation upon the estate in fee, of the children of Elizabeth A.; that an estate tail in her children was created by the words, '*if Elizabeth A. shall die without children,*' and the estate in them was thereby limited to the issue, and the issue of the issue of such children until their extinction. In other words, Ferris intended, by the fourth item of his will, to cut down the fee simple created in the children of Elizabeth by the third item of his will, to a fee tail, and thereby create an estate tail in the issue of Elizabeth limited only by the indefinite failure of such issue."

This is a most extraordinary statement. It is difficult

to determine exactly how to deal with it. It is too mild altogether merely to say that the plaintiffs never made any such claim. They never claimed anything like it; anything that could ever, by any one who would take the trouble to learn what they did claim, be construed into an approximation to it. The fact is, they claimed just the reverse of this. They rested their whole case on the claim that it was not the intention of the testator, by the words used in the fourth item, to limit or cut down the estate in fee simple, previously devised to the children of his daughter. They maintained that the estate in fee devised to the children, vested on the birth of the first, subject to open and let in all after born, and was not subject to be divested, cut down, or afterward affected by any event whatever; that, on the birth of the child, the possibility of the vesting of the alternative remainder was forever destroyed, and that on its death, its vested remainder in fee, by the Statute of Ohio, passed to its mother and was devised by her will. The idea of claiming for the children of the daughter an estate tail, is entirely original with the court. No one had ever before thought of it. Whoever will read the abstract of the argument made for the plaintiffs in that case, and reported with it, will be convinced. The decision of the court was made on a case not before them, and against a proposition of their own invention. They could with as much propriety have given an airing to the rule in Shelley's case, and shown how unsuited it is to the genius of our institutions.

The claim which was actually made in that case for the plaintiffs was the same urged in the present argument, urged upon the same grounds and vindicated by the same authorities. To that claim the Supreme Court of Ohio do not even allude. They take no notice of the principles on

which it was alleged to be founded, overlooked the arguments used in supporting it, and never mention the cases cited in its behalf. They were too intent on demolishing their man of straw.

The point to which the whole argument of the court is directed is, that the words "*die without children*" cannot be construed as looking to an indefinite failure of issue. On the question really presented and argued, that they must be taken, in the circumstances of this case, to mean *dying without having children*, they say not a word, and do not so much as intimate that such a point was made, much less that it was the only one relied on.

So far from claiming that the ulterior limitation was void as being too remote, we simply claimed that it never took effect; the failure of children which we declared to be intended, was not indefinite, but definite, the want of children, coming into *esse*, in whom the first remainder in fee could vest. We asked to be shown what language the testator had used to postpone the vesting of the estate in fee limited to his daughter's children, until her death, or after it had vested, to devest it, in the event of their not surviving her. The only answer was, that dying without children does not mean an indefinite failure of issue!

But there is a glaring inconsistency between the conclusion of the court in this case, and the reasoning by which they seek to support it, that sufficiently shows that the court is wrong upon its own principles.

The court strenuously object to the rule construing the words in question, as importing an indefinite failure of issue, on the ground that it is an artificial and technical rule, imposing upon the words an arbitrary signification, without reference to the meaning of the testator, as expressed in all the circumstances of his will; and the te-

nacity with which the English courts have clung to it, is cited as a remarkable instance of judicial perversity, willing always to sacrifice the intention of a testator in the disposition of his property, to the maintenance, in its integrity, of an absurd and obsolete maxim of legal interpretation.

We do not propose to enter into any vindication of the English decisions on the subject of this rule of construction. It is not necessary to our case, and has no lawful connection with it. But this much, at least, is certain: English courts and judges in applying it, have invariably attempted to justify themselves, on the ground that the general and paramount intent of the testator, as disclosed in his whole will, required it, and would otherwise be sacrificed to an inconsistent and minor intent.

Now, what does the Supreme Court of Ohio, in the case now under discussion, determine to do? They reject the English rule on their own mere motion, because it does not suit their ideas, and undertake to establish, by judicial legislation—a modern practice far more common than convenient—another rule instead. They say, heretofore these words in wills have been held, by English courts, to import an indefinite failure of issue; but hereafter, the American rule shall be, that they are to be taken as meaning a failure of issue living at the death of the first taker.

But, now, what becomes of the intention of the testator, for which such zealous regard was professed? Is not that to be consulted and deferred to? Are you not to study his language, his circumstances, the situation of his property, the condition of his family and beneficiaries, and to read his expressed will in the light of the facts in which it was written? Are you not to determine, in each case, the meaning which the testator has himself chosen to affix

to the terms he has employed, and thus truly to interpret the wishes of each individual, without reference to technical restraints and arbitrary distinctions?

If such was the purpose of the Supreme Court of Ohio, they soon lost sight of it. Attacking and overthrowing the old rule, on the ground of its being false in principle, they have adopted a new one, based on the same principle, and thus have perpetuated the old error, as the head of a new stock. Instead of overthrowing the empire of wrong construction, and restoring true legitimacy, they have simply changed dynasties.

It is true that, hereafter, the words in question are not to mean what English courts have determined they shall mean; but they are to be understood as meaning—not what it may appear that the testator in a given case intended by them, but—what the Supreme Court of Ohio have decreed that they shall mean. They expressly refuse to rest their conclusion upon the ground that it is necessary, from the language of the will, the nature of its dispositions, and all other proper circumstances, but state it as resting upon the fixed, arbitrary, rigid, and unbending signification of the particular terms, isolated from the context and every special consideration affecting their meaning, unless, forsooth, the testator shall expressly, or by necessary implication, declare that he does not mean to be understood in the sense in which otherwise the Supreme Court of Ohio declare that they will understand him to speak.

In other words, the will, in each case, is not to receive a fair and impartial treatment, judged by its own terms, but the Supreme Court of Ohio have put a *prima facie* interpretation upon them all, only to be rebutted by express declarations of the testator to the contrary.

When the Supreme Court of Ohio have established the reprehensible perversity of the English courts, in substituting their own for the wills of testators, we think they have also fully answered the grounds on which they seek to justify the interpolation into the law which they have attempted in this case.

The only cases quoted or cited by the Supreme Court of Ohio, in support of their decision in this case, are those above cited, viz: *Morgan* v. *Morgan*, 5 Day, 517; *Harris* v. *Smith*, 16 Georgia, 545; *Anderson* v. *Jackson*, 16 Johns., 382; and *Daniel* v. *Thomson*, 14 Ben. Monroe, 662.

We have already abundantly shown that these cases have no possible application to the question in this case.

It cannot, we think, be seriously claimed that this decision has any title to be considered as a precedent. The presumption is, that the court which pronounced it will not so regard it; but, on the contrary, will take the first opportunity to correct it.

2. Can it be claimed that this decision furnishes to the federal tribunals a binding rule, without respect to its correctness, simply because it is a decision of the highest State court upon the title to lands lying within the State?

The rule upon that subject, laid down by the Supreme Court of the United States, is, that it does not consider itself bound to follow the decisions of a State court, upon the construction of wills devising lands, unless such decisions have, by long acquiescence, become rules of property:

*Lane* v. *Vick*, 3 Howard, 464.
*Jackson* v. *Chew*, 12 Wheaton, 167.
*Swift* v. *Tyson*, 16 Peters, 1.
*Waring* v. *Jackson*, 1 Peters, 570.

*Daly's lessee* v. *James*, 8 Wheat., 495.
*Foxcroft* v. *Mallett*, 4 Howard, 353.
*Williamson* v. *Berry*, 8 Howard, 543.
*Van Ranselaer* v. *Kearney*, 11 Howard, 297.
*Beauregard* v. *New Orleans*, 18 Howard, 497.
*Homer* v. *Brown*, 16 Howard, 354.
*Abbott* v. *Essex Co.*, 18 Howard, 202.
*Webster* v. *Cooper*, 14 Howard, 488.

In the case of *Lane* v. *Vick*, the Supreme Court gave a construction to the will inconsistent with that put upon it by the Supreme Court of Mississippi; and Judge McLean said (p. 476): "With the greatest respect, it may be proper to say, that this court do not follow the State courts in their construction of a will, or any other instrument, as they do in the construction of statutes. Where, as in the case of *Jackson* v. *Chew*, 12 Wheat., 167, the construction of a will had been settled by the highest courts of the State, *and had long been acquiesced in as a rule of property*, this court would follow it, because it had become a rule of property."

In the case of *Daly's lessee* v. *James*, 8 Wheat. 495, Mr. Justice Johnson said:

"Upon the question so solemnly pressed upon this court in the argument, how far the decision of the court of Pennsylvania ought to have been considered as obligatory in this court, I would be understood as entertaining the following views: As precedents, entitled to high respect, the decisions of the State court will always be considered; and in all cases of local law we acknowledge an established and uniform course of decisions of the State courts, in the respective States, as the law of this court; that is to say, that such decisions will be as obligatory upon this court, as they would be acknowledged to be in their own courts. *But a single decision on the construction of a will cannot be acknowledged as of binding efficacy*, however it may be respected as a precedent."

In the case of *Homer* v. *Brown*, 16 Howard, 354, a construction was placed upon a will, devising lands in Massachusetts, in opposition to that declared by the Supreme Court of that State, in a case involving the same property and between the same parties.

3. But it is claimed that the judgment of the Supreme Court of Ohio, in the case referred to, operates as a bar to the present action, by way of estoppel—that the present controversy has become *res adjudicata.*

To determine this it will be well to recapitulate the history of the litigation.

The present defendants brought their action of ejectment against Francis A. Parrish, then in possession, according to the forms of the common law, in force in this State.

Pending that action, the present Civil Code having in the meantime taken effect, Parrish filed his petition under section 557 of the Code (Swan's Rev. Statutes, ed. 1854, p. 695), for the purpose of quieting his title. That section provides that "an action may be brought by any person in possession by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

This section was undoubtedly intended to furnish a substitute for the bill in chancery, previously in use, to quiet titles to real estate, and has no greater effect. It does not affect the question of possession. That can only be lawfully changed by virtue of the action authorized by section 558, the substitute for the action of ejectment. It will be observed as to the latter, by section 352, the first judgment is not conclusive, but must be set aside, as a matter of course, on motion of the party against whom it is ren-

dered. The judgment finally rendered is made a bar by section 563. As regards the former action, provided by section 557, the whole effect of the proceeding is this: if the plaintiff succeeds, he obtains a perpetual injunction against the defendants, preventing them from asserting against him any adverse title; if he fails, his petition is dismissed, the possession remains unchanged, and the parties are left, as before, to recover or defend the possession in the appropriate action.

Upon the petition filed by Parrish, the facts were agreed upon, not being in dispute, and the court declared their opinion of the law, adverse to the claim asserted by the plaintiffs, and entered a judgment simply dismissing their petition.

The point decided was merely this, *that the plaintiffs in that action were not entitled to have an injunction restraining the defendants from prosecuting their action of ejectment.* The latter action is still pending. In the meantime the defendants obtain by force a violent and illegal possession of the lands in controversy. The present plaintiff having acquired the title of all the heirs of his brother, Francis A. Parrish, and being a citizen of the State of Iowa, seeks in the present suit to recover back that possession. The points in issue, in the two actions, are not the same. The fact that in both, the will of Ferris had to be construed, and in that way the claim of title, of the respective parties to be passed upon, is immaterial. The former judgment cannot be used as a bar in this action, as an estoppel, unless it had been a determination of the very point now in issue and between the same parties.

The point in issue is not the same; the parties are not the same, neither in fact nor in law. The form of the record here precludes that claim. The plaintiff in this ac-

tion though fictitious, is so far real as to prevent the estoppel.

If the defendants in the present ejectment had actually recovered possession in their action of ejectment, the case would be much stronger for them, for then the point in issue—the right of possession—would have been the same in both. But it is perfectly well settled that a former recovery, in ejectment, is no bar to a second ejectment by the parties against whom judgment was rendered.

"The amount of a recovery in ejectment is accurately and forcibly stated by Lord Mansfield, in the case of *Atkyns* v. *Horde*, 1 Burr., 114. It is a recovery of the possession (not of the seizin in freehold), without prejudice to the right as it may afterward appear, even between the same parties. He who enters under it, in truth and substance, can only be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no title, he is in as a trespasser. If he had no right to the possession, then he takes only a naked possession. This is the obvious and established construction of the nature and effect of a judgment in the action of ejectment." (Per Van Ness, J., in *Jackson ex dem. Wright et al.* v. *Duffendorf et al.*, 3 Johns. Rep., 270.)

*Smith* v. *Sherwood*, 4 Conn. Rep., 276.
*Betts, etc.* v. *Shield's heirs*, 3 Litt. R., 36.

A judgment in ejectment confers no title upon the party in whose favor it is given, and is not evidence in a subsequent action, even between the same parties. The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment; for the plaintiff in the suit is only a fictitious person, and as the

demise, term, etc., may be laid many different ways, it never can be made to appear that the second ejectment is brought upon the same title as the first.

*Adams' Ejectment*, 351.
*Bradford* v. *Bradford*, 5 Conn., 127.
*Jackson ex dem. Hills* v. *Tuttle*, 9 Cowen, 233.
*Hopkins* v. *M'Larens*, 4 Cowen, 667.
*Rambler* v. *Tryon*, 7 Serg. and Rawle, 90.
*Ives* v. *Lett*, 14 Serg. and Rawle, 301.
*White* v. *Kyle's lessee*, 1 Serg. and Rawle, 515.
*Richardson* v. *Stewart's lessee*, 2 Serg. and Rawle, 87.
*Pollard* v. *Baylord*, 6 Munf., 433.
*Lessee of Lockman* v. *Lockman*, 18 Ohio R., 362.

The circumstances of the case of *Homer* v. *Brown*, 16 Howard, 354, are very analogous to those of the present.

Brown, claiming title to lands in Boston, under the will of his grandfather, made in Massachusetts, brought his writ of entry, to recover possession, in the State court. The case was decided in the supreme court of Massachusetts (*Brown* v. *Homer*, 3 Cushing Rep., 390) upon an agreed statement of facts, and judgment of nonsuit was given on the ground that he had no title. Being a citizen of Vermont, he then brought his suit, by a writ of right, under the Massachusetts statute, adopted by the federal courts as part of their practice in that State, against the same party, Homer, in the Circuit Court of the United States for that district, and recovered judgment, which Homer sought to reverse, by writ of error, in the Supreme Court of the United States, alleging, among others, that the court below had erred in not giving effect to the judgment of the supreme court of the State, as a bar, by way of estoppel.

Judge Wayne, in delivering the opinion of the court (p. 365), after stating that a technical judgment of nonsuit was not conclusive, says:

"It is not, however, only for a non-appearance, or for delays or defaults, that a nonsuit may be entered. The plaintiff, in such particulars, may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury, with a view to submit the law of the case to the court, upon an agreed statement of facts, with an agreement that the plaintiff shall be *non-pros'd*, if the facts stated are insufficient to maintain the right which he claims. The court, in such a case, will order a nonsuit, if it shall think the law of it against the plaintiff; but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same, and no more, than if he had been *non-pros'd* for a non-appearance when called to prosecute his suit, or from one of those delays from which it may be adjudged that he is indifferent. The supreme court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties, but its judgment cannot be pleaded as a bar to the suit, *though in giving it, an opinion was expressed upon the merit of the demandant's claim*, under the will of his grandfather, William Brown."

In the suit in the courts of Ohio, the plaintiff sought the equitable relief by an injunction to restrain the defendants from asserting an adverse title. The defendants, by counterclaim, asked to have their title established, and possession given to them. The court find the facts as agreed on, and not now disputed, and declare the title to be, upon the legal construction of the will, in the defendants, *but enter no judgment in their favor, upon their prayer to have possession awarded them.* It simply dismisses the plaintiff's petition, and leaves the possession unchanged. Admitting that the defendants, under the Ohio code, had the right to file such a counterclaim (which we do not), and supposing that the court had en-

tered judgment in their favor, awarding them the possession (which was not done), still it would not have been conclusive, as we have already shown, inasmuch as the plaintiff would, in that event, have been entitled to vacate the judgment as a matter of right. See,

*City of Marietta* v. *Emerson*, 5 Ohio State Rep., 288.
*Singer* v. *Belt*, 8 Ohio State Rep., 291.

As it is, the judgment actually rendered has no more effect than a *nonsuit:* it simply denies the equitable relief prayed for, leaving the whole question as to the right of the possession undisposed of. It is not, in the circumstances, of as much force as a judgment in ejectment in favor of the defendants, and possession awarded. We have already seen that such a judgment would be no bar.

In that view, the remarks of the court in the case of *Hickey's lessee* v. *Stewart*, 3 Howard, 759, apply:

"To enable the defendants, in this case," says Mr. Justice McKinley, "to defend their possession successfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiff; otherwise, it opposes no legal bar to the recovery in the action of ejectment. And conceding what was contended for in argument, that the decree and possession under it, by the writ of *habere facias*, is equivalent to a judgment in ejectment, followed by like possession, it would avail the defendants nothing in this case; because such a judgment and possession are no bar to another action of ejectment for the same premises.

The case of *Speed, etc.* v. *Braxdell*, 7 Monroe Rep., 571, is also very much to the present point. In that case, a decree in chancery, in a former suit between the same parties, rendered against Braxdell, was relied on as a bar to his recovery in ejectment. The court say:

"The object of the former suit was to obtain from Speed the conveyance of the legal title with which he was then supposed to be invested; and the object of the latter is to recover the possession of the land under the legal title which Speed was then supposed to have, but which is now claimed by Braxdell to be in him. Suits having such dissimilar objects, and involving questions of rights so essentially different cannot be denominated suits of like nature; nor can the decree which was pronounced in the former against Braxdell, constitute a bar to the latter action, which has been brought by him. The judgment or decree, which is the fruit of the action or suit, can only follow the nature of the particular right claimed, and the injury complained of, and can conclude no further than the existence of the right, the injury thereto, and the compensation due for the same. A judgment or decree is final for its own proper purpose and object, and no further; and is conclusive upon its own subject matter only, by way of bar to future litigation, for the thing thereby decided."

We have thus, at considerable length, gone through the argument in favor of the claim of the lessor of the plaintiff, both on grounds of reason and authority. We have shown, by an analysis of the will, that it is the direct result of a construction required by its terms, read in the light of the circumstances existing when they were employed, and necessary to give effect to the expressed wishes of the testator. We have shown that the interpretation we contend for, is favored by all the maxims and policy of the law, and supported by a series of decisions rendered by the highest judicial tribunals in England, and never questioned in this country. We have shown that the opposite claim finds its strongest support in events which have happened since the death of the testator, and which, while it is perfectly plain he did not contemplate nor expressly provide for, ought not to have anything to

do with the determination of the intention he chose to express; and is maintained by an argument, based on decisions, in respect to a rule of construction which has no possible application to the case.

We claim, with confidence, that the title of the plaintiff's lessor has been established under the will of Andrew Ferris; and are not yet, at least, convinced that it is not invincibly supported by the soundest legal reasons and the most authoritative judicial decisions.

WORTHINGTON & MATTHEWS,
*Attorneys for Plaintiff.*

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# Supreme Court of the United States.

## December Term, 1862.

## No. 114.

LESSEE OF JOSEPH C. PARRISH
*vs.*
ELIPHALET FERRIS AND OTHERS
} *Error.*

**POINTS FOR THE DEFENDANTS.**

A. TAFT, of Counsel for Def'ts.

# Supreme Court of the United States.

LESSEE OF JOSEPH C. PARRISH
*vs.*
ELIPHALET FERRIS AND OTHERS.
} *Error.*

The lessor of the plaintiff in the present suit, as heir of Francis A Parrish, and as grantee of the other heirs, holds the same interest with the plaintiffs in the case of *Francis A. Parrish's heirs* vs. *Eliphalet Ferris, and others*, see Record p. 25–47; and these defendants are identical with the defendants in said former suit.

I. The question of the title of the plaintiff, and of the defendants, was directly in issue in said former cause, and was decided,

Code of Civil proceedings in Ohio, sec. 557.
2 Swan & Cr. Statutes, p.
Swan's Statutes of 1841, p. 703, s. 514.
See petition contained in Record p. 25–6.
Answers and counter-claims, 29–30 and 34–36.
Answer of pl'tiffs to counter-claims, 37–8 and 38–9.
Decree " " " 42–44.
Parrish's heirs v. Ferris, 6 Ohio St. R. 563.

12 O. St. R. 320

II. The Record of the proceedings in that cause is conclusive against the plaintiff in the present cause.

Hubbard *v.* Clark, 8 O. R., 382.
Wallace *v.* Porter, 14 O. R., 272.
Grant *v.* Ramsey, 7 O. St. R., 162.

Smith *v.* Kernochen, 7 How. R., 198.
Stockton *v.* Ford, 18 How. R. 418.
Washington Br. Co. *v.* Steward, 3 How. R., 413.
Parker *v.* Kane, 22 How. R., 1.
Bank U. S. *v.* Beverly, 1 How. R., 134.

Neaffie *v.* Neaffie, 1 Ch., 1.
White *v.* Coalsworth, 2 Selden 137.
Wendell *v.* Lewis, 6 Paige, 233.
Monroe *v.* Douglas, 4 Sanford Ch. R., 176.
Fischli *v.* Fischli, 1 Black'd R., 360.
Talbot *v.* Todd, 5 Dana, 193.
Wolcott *v.* Robbins, 26 Conn., 236.
Ross *v.* Young, 5 Snead, (Tenn.) 627.
1 McCallister's R., (Cal.) 113, 360.
1 Greenleaf's Ev., §§ 528, 529, 530, 531, 532.

4 Rawle 288
14 Mass. R. 241
17 " 365
6 Paige 169

III. "This Court adopts the local law of real property as ascertained by the decisions of State Courts, whether these decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State, which has become a fixed rule of property."

Waring *v.* Jackson, 1 Pet. R., 571.
Jackson *v.* Chew, 12 Wheat. R., 167.
Beauregard *v.* New Orleans, 18 How. R., 502.
Abbott *v.* Essex Co., 18 How. R., 202.
Daly's Lessee *v.* James, 8 Wheat, 495.
Swift *v.* Tyson 16 P., 1.
Wheeler *v.* Smith, 9 How., 78.
Henderson *v.* Griffin, 5 P., 151.
Lane *v.* Vick, 3 How., 464.
Fisher *v.* Haldeman, 20 H. 186.
Green *v.* Neal, 6 P., 291, 296, 297, 298.

**IV.** The Supreme Court of Ohio, has by repeated decisions settled the principle, "that the words 'if she die without children,' in wills, are to be interpreted according to their plain, popular and natural meaning as referring to the time of the person's death, unless the contrary intent is plainly expressed in the will or is necessary to carry out its undoubted purposes,"

King *v.* King, 15 O. R., 567.
Parrish *v.* Ferris, 6 O. St. R., 563.
Niles *v.* Gray, 12 O. St. R., ~~567.~~ 320
Brewster *v.* Benedict, 14 O. R., 383.
Stevenson *v.* Evans, 10 O. St. R., 308, 311, 314.

3 O. R. 157

**V.** The intent expressed by the will of Andrew Ferris was, that if his daughter Elizabeth A. should die without children, or issue, *living at her death*, the estate should go to his brothers and sisters and their heirs, and that intent was lawful, and ought to be carried out.

Parrish's Heirs *v.* Ferris, 6 O. St. R., 563.
Niles *v.* Gray, 12 O. St. R., 567.
Abbott *v.* The Essex Co., 18 How. R., 202.
Morgan *v.* Morgan, 5 Day R., 523.
King *v.* King, 15 O. R., 561.
Daniel *v.* Thomson, 14 B. Mon. R., 662.
Brewster *v.* Benedict, 14 O. R., 382.
Anderson *v.* Jackson, 16 John's. R., 382.
Harris *v.* Smith, 16 Georgia R., 545.
Brownsword *v.* Edwards, 2 Ves. Sen'r, 249.
1 R. S, Statutes of New York, 724, s. 22.
3 Barb., 247.
Code of Virginia, 1849, p. 501, s. 10.
Rev. Stat. of Kentucky, 1852, p. 541, s. 9.
1 Vic. c. 26, s. 29.
1 Peere Wms., 534, 667, 664.
Banfield *v.* Pelton, 2 B. & P., 327–8.
Roe *v.* Jeffrey, 7 T. R., 589.
King *v.* Frost, 3 Barn. & Ald., 546.
Gibson *v.* Walker, 20 N. Y., 170, 179.
Foxwell *v.* Braddock, 1 Patton & Heath, 250.
Benton *v.* Patterson, 8 Geo. R., 146; 385.
Fosdick *v.* Corwell, 1 John. R., 449.
3 John. R., 292.
1 Br. Ch. R., 190.
Roe *v.* Briggs, 16 East, 406.
Dunwoodie *v.* Reed, 3 S. & R., 433, 450–1.
1 Sumner, 244.
Dumon *v.* Stringham 26 Barb., 104.

13 Grat 152
2 Dev. 504
2 Jones. 428
1 Barn. & Ald. 714
12 Wheat 153

**VI.** In the present case it is immaterial, whether we consider the provisions in the will, intended to create concurrent contingent remainders, or a contingent remainder to the children of Elizabeth, with an executory devise over. The material question is, what is the *contingency* that is to decide between them. None of the cases cited by the counsel for plaintiff, turned upon the contingency that the devisee for life should die without children *living at her death*. But this case, by the established rule of construction in Ohio, turns on precisely that contingency.

Roe *v.* Briggs, 16 E., 406.
Denn *v.* Bagshaw, 6 T., 512
Dunwoodie *v.* Reed, 3 S. & R., 435.
Gulliver *v.* Wickett, 1 Wilson, 105.
Parrish's *v.* Ferris, 6 Ohio St. R. 563.
Niles *v.* Gray, 12 O. St. R. ~~567.~~ 320
Baker *v.* Lorillard, 4 Comst. R., 257.
Daniel *v.* Thomson, 14 B. Mon. 662.
3 Barb., 247. Cly
1 R. S. St (N. Y.) ~~72, 45, 22.~~ 724.5.22

13 Gratt. R. 152
19 Conn. 107
6 Gray 18
1 Pat & H. 250

...ere it comes be held an executory
...e 6. O. St. R. 480
2 Dorg. 504

**VII.** But there are in Andrew Ferris' will, words added to the phrase "die without children," sufficient to show that the children or issue of Elizabeth, to which the will referred, were only such as should be *living at the death of Elizabeth.*

Banfield *v.* Pelton, 2 B. & P., 327–8.
Roe *v.* Jeffrey, 7 T. R., 589.
4 E. C. L., 738.
King *v.* Frost, 3 Barn. & Ald., 546.
Benton *v.* Patterson, 8 Geo. R., 146; 385.
Carlton *v.* Price, 10 Geo R., 495.
Baker *v.* Lovilland, 4 Comstock, 257.
1 Patton & Heath, 250.
Porter *v.* Bradley, 3 T. R., 143.
Theo. Seminary of Auburn *v.* Cole, 18 Barb., 360.
16 N. Y., 87.
9 E. L. & E., 88.
Hall *v.* Chaffee, 14 N. H., 223, 224.
Downing *v.* Merwin, 19 N. H., 9, 86, 90.
Harris *v.* Smith, 10 Geo. R., 555. 556.
2 Jarman, 446.

For authorities on this, and the two preceeding points, I refer to the accompanying printed argument prepared and filed by me in the case of *Francis A. Parrish's Heirs* vs. *Eliphalet Ferris and others*, and which I make part of my argument in the present case.

ALPHONSO TAFT.
*For Defendants.*

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# SUPREME COURT OF OHIO.

DECEMBER TERM.

## Error to the District Court of Ohio, for Hamilton Co.

FRANCIS A. PARRISH'S HEIRS,
*Against*
ELIPHALET FERRIS, AND OTHERS.

TAFT, KEY & PERRY,
AND
GEORGE R. SAGE,
of Counsel for Defendants.

# SUPREME COURT OF OHIO.

DECEMBER TERM, 1855.

FRANCIS A. PARRISH'S HEIRS
*Against*
ELIPHALET FERRIS, AND OTHERS.

**Action to Quiet Title.**

## POINTS.

### I.

That, where a testator devised to his daughter a life estate in land, and after her death, the fee to her children, (if she should have any heirs;) and if she should die without children, then to the testator's brothers and sisters and their heirs, the intent of the testator must prevail.

### II.

That by such a devise the testator intended, that the event on which the fee should go over to his brothers and sisters should be, not the indefinite failure of the issue of his daughter, but her death without children or descendants, *living at her death.*

## ARGUMENT FOR DEFENDANTS.

Andrew Ferris died, having made his will, dated June 7th, 1849, of which the clauses to be construed by the Court are as follows, viz.:

"*Second.* I give to my daughter, Elizabeth A., the use of the two hundred acres, (more or less,) of land on which I now live, [describing it;] also sixty-seven acres, more or less, in section No. 21 of the same township, [describing it,] during her natural life. To have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live."

"*Third.* I give and bequeath to my daughter Elizabeth's children, (if she shall have any heirs,) their heirs and assigns forever, all the above-described two hundred and sixty-seven acres of land, after Elizabeth is done using or occupying it, and at Elizabeth's death."

"*Fourth.* If my daughter Elizabeth A. shall die without children, then and in that case, I give and bequeath the said two hundred and sixty-seven acres of land, above described, to my brothers and sisters, their heirs and assigns for ever, after the death of Elizabeth A. as aforesaid."

After the testator's death, Elizabeth A. Ferris married Francis A. Parrish.

On the 17th August, 1852, she was delivered of a child born alive, but which lived only an hour. August 22d, 1852, she made a will, devising to her husband, Francis A. Parrish, his heirs and assigns forever, all her property, and soon after died, leaving no child surviving her. Andrew Ferris left brothers and sisters, who survived his daughter. Francis A. Parrish survived

his wife, but has died since the commencement of this suit, leaving the present plaintiffs, his brothers and sisters, his heirs at law.

We claim that Elizabeth died *without children*, and that, at her death, the lands went by her father's will, to his brothers and sisters, the defendants. All the clauses of the will are to be taken together in giving it a fair and reasonable construction, and the actual intention is to prevail, if that be not against any rule of law.

The object of the testator, manifest in the will,—that without which no will would have been made,—was to prevent precisely the thing which the plaintiffs say has happened, viz., the going over of his property to strangers, before, or at the death of Elizabeth. He did not seek to change the law in any respect. He did not seek to deprive Elizabeth of his property so long as she should live. But he did intend, that, if after she had enjoyed it all her life time, she should have no child to enjoy it after her, it should thereupon go to his brothers and sisters, just as the law would carry it, if the regular course of descent was not broken. That Elizabeth should not be able to break that regular course of descent, and give the property away ftom his kindred, was what he intended to secure. He did not seek to control the course of that descent, or rather, to insist upon the property descending, beyond the death of his daughter. At her death, the property was to go as the law of descents would cast it, and neither Elizabeth, nor any one else, was to disappoint the law of descents, until after her death.

The plaintiffs say, that the heir is to be favored in the construction of a will, and claim the benefit of that principle But we insist, that the brothers and sisters of the testator, who are the heirs of Elizabeth, are

entitled to the benefit of that principle far more than the plaintiffs in this case, who are neither heirs of the testator, nor of Elizabeth. The purpose of the will was to preserve the regular course of descent until, and at the death of Elizabeth. If the testator had any purpose in making his will, this was it.

His desire to have his real estate go to his kindred was natural, and right, and so far as he sought to effect that object, it was lawful.

We shall insist, that the language of the will expresses unequivocally that reasonable and natural intent, and that it never entered into the imagination of the testator, that if Elizabeth should die, leaving children to inherit, that after an indefinite failure of her issue, the property should go over to his brothers and sisters, nor that it should be determined before the death of Elizabeth where the property should go, by the birth and death of a child, or in any other manner. At her death, the question was to be settled; and it was to be settled by her leaving, or not leaving children or descendants, to take the property at her death.

The counsel for the plaintiffs, in the thirtieth point of their brief, assert that, "the phrase, dying without children, is identical with the phrase, dying without issue; that neither of them point to the death of the first taker, without superadded words: that there is no distinction between them."

In the sixteenth point of their brief, they assert, that "a devise limited to take effect after a dying without issue, or without heirs, or on failure of issue, or without leaving issue, is held to be void, because the contingency is too remote, as it does not take place until after the indefinite failure of issue. But if there be any terms to fix the limit upon the definite failure of issue, it will be good."

By the eighteenth point, plaintiff's counsel claim that "the devise to Elizabeth's children, (if she had any heirs,) their heirs and assigns forever, and if she died without children, then and in that case, to his brothers and sisters, etc., created alternative remainders, and upon the birth of her child the remainder vested absolutely in such child and its heirs, subject to open and let in after-born children, but cut off the remainder over to the testator's brothers and sisters."

The substance of all these propositions is either, that the limitation to the brothers and sisters is too remote, being after an indefinite failure of issue of Elizabeth, and so void altogether; or that the will created two alternative contingent remainders depending upon the event of Elizabeth having any children. And in order to sustain the latter proposition they have to construe the words "die without children," to mean, die without having had children.

A great many points are stated, and cases cited; but if the testator meant to give the property to his brothers and sisters, on the death of Elizabeth without children (or issue) living at her death, then all these points and cases must pass for nothing. It is of no avail to raise the antiquated ghost of an indefinite failure of issue, if the testator did after all mean a definite failure of issue, at the death of his daughter. And it is equally unavailing to talk of alternate contingencies, if the only contingency in the case, is the death of Elizabeth without children (or issue), living at her death.

Now, we say, that Andrew Ferris, after the life estate to his daughter, devised the remainder, to his brothers and sisters, if Elizabeth should die without children (or issue), living at her death. This single

proposition meets every phase, and all the thirty points of the argument for plaintiffs.

It will be perceived, on examining the points of the plaintiff's argument, that if they be sound. then this devise over to the brothers and sisters of the testator was totally void from the beginning, and could not be, or become operative, in any contingency whatever.

They say, that *dying without children* is the same with *dying without issue*, and that *dying without issue* was an indefinite failure of issue, and so too remote a contingency on which to limit any remainder.

It is admitted by plaintiff's counsel, in their seventeenth point, that, "in the construction of wills limiting estates after the failure of issue, the Courts lean to any circumstance, however slight, to take the case out of the rule of indefinite failure of issue." That is, that Courts lean to the natural meaning of the words referring them to the death of the first devisee, when aided by slight circumstances. Of this there can be no doubt, at the present day.

We claim, that in the State of Ohio, the legal, as well as the popular and natural sense, of the words, "dying without children," or issue, etc., is without children, etc., at the *death*; and that the Courts do not require the aid of additional words.

But we propose, in the first p'ace, to show by authorities, English and American, what additional words, are sufficient to warrant the Courts of England, and of those States where the English precedents have been followed, to refer the words. dying without children, or issue, to the time of the death of the first devisee: *and, that those sufficient additional words are unequivocally contained in the will of Andrew Ferris.*

It may be here remarked, that several, if not all, of the States, where the English doctrine of implying an indefinite failure of issue on the words, dying without issue, has prevailed, have by legislative enactment, abrogated the rule, and required the will to be construed according to its natural meaning; and even England has done the same thing. This shows how poorly the rule commends itself to the common sense of mankind, in the present age.

There can be no doubt, but the Courts have been constantly embarrassed with the unreasonableness of the rule, ever since it was established. The strong influence in favor of family settlements on lineal descendants, which caused the enactment of the statute *de donis* in England, gave countenance to the early decisions which established the rule, and became precedents for the Courts of that country, where they originated, and for those States where a similar policy did for a time prevail. But those decisions ought not to be considered precedents for the Courts of Ohio, a State which began its career as a distinct sovereignty after the old States had found reason to change their policy on this subject, and which has never shared in the partialities of England and the older States for family entailments, or in the desire to trammel the reasonable disposition of property by will.

Any circumstance which shows that the event, that is to determine where the estate shall go, shall happen within the life of one in being and twenty-one years, will make the devise over, after the death without issue, good. *Croke, James* 590. W. B. devised lands to T. B. and his heirs, paying to R. N., at twenty-one years of age, £20.; and if T. B. died without issue living W. B.,

senior, then over to W. B., junior, paying the £20. The devise over was held to be good.

This case settled the principle that the words, die without issue, may be taken to refer to the death of the first devisee, and not indefinite. Since this case, it has been fully established by cases, that any circumstances outside of the phrase, die without issue, showing that the devisee did not contemplate an indefinite failure of issue, but a failure within a definite time, (not exceeding a life in being and 21 years,) should be considered to take the case out of the rule of indefinite failure of issue, and the devise over should be good.

That the rule itself is, and ever has been, unreasonable and abhorrent to the feelings and the sense of chancellors and judges, English and American, is manifest from the tone of remark with which they have commented on the rule, and taken one case after another, out of it. Not one of these judges would recommend the adoption of this rule to any country which is free from it.

Lord Chancellor Thurlow, in 1 Br. Ch. R., 190, says: "I agree that the general sense of dying without issue is at the time of the death. That is the grammatical construction, and is the sense, in general, of those who use the words. There should be as little contradiction as may be in the determinations of the Court: the words "*leaving*," and "after," go far towards overturning the rule.

"I shall not go further than I am obliged by the cases, in determining against what I think the meaning of the testator, which, I am afraid I must do, or overturn the established rule."

The Chancellor indicates very clearly his opinion, that the English rule of construction defeated the in-

tention of the will, and evidently followed the rule with reluctance. Ohio has no such precedents, and has established no such rule.

In the case of Porter *vs.* Bradley, 3 T. R., 143, the devise was to "Philip Dobin, his heirs and assigns forever; but in case Philip should happen to die, leaving no issue *behind him*," then over. Kenyon, Ch. J., held that the words "behind him," made a material difference, and that the devise over was good.

The words *leaving* issue, have, in several cases, been held to be subject to the same technical rule as "dying without issue," defeating a devise over as too remote.

4 E. C. L., 738, Doe *vs.* Webber: The clause in the will was, "that in case my niece, Mary Hiles, shall happen to die and leave no *child or children*, then my will is, I give, devise, and bequeath unto my niece, Jane Barnes, all my freehold lands to her and her heirs forever, paying the sum of £1,000 unto the executor of Mary Hiles, or such person as she by last will should direct."

Held, that "child or children" were in that case synonimous with issue, but the executor's devise over to Jane Barnes was good.

"Paying the £1,000 to the executors of Mary Hiles," added to the words "leave no child or children," was considered sufficient to take the case out of the rule.

Though child or children might be taken for issue to avoid excluding grand-children, it nevertheless shows that an indefinite failure of issue is not contemplated, but such as should happen in the lifetime of the first devisee.

So in the case at bar, if the Court should be of opinion that the "dying without children" should, in favor of the issue, be construed to include grand-chil-

dren or issue, yet it is a strong circumstance to show that the testator did not contemplate a period beyond that in which the first class of issue or children would come upon the stage.

But it is not necessary that we should admit, that dying without children, in this case, is to be construed the same as "dying without issue." The preceding clause of the will gives to the children of Elizabeth (if she shall have any heirs,) a fee; the meaning of which is, a gift of the fee to the children of Elizabeth, who may live to be her heirs, or who may survive her,—children who may live so as to be capable of inheriting as heirs from their mother. Now, it is a rule of interpretation in such cases, that where an express gift is made by devise to any part or class of the issue, and then a gift over in default of issue, or children, or heirs of the body, the last clause is construed as the first, and "dying without children" must be taken to mean such children as are intended by the preceding gift These two clauses must and will be construed together, and will be held to refer to the same class of persons; and each clause has, in itself, evidence that the children intended, whether including grand-children or not, must be living at the death of Elizabeth.

The gift to Elizabeth's children, if she shall have any *heirs*, is expressly to take effect "*after Elizabeth is done using or occupying it, and at Elizabeth's death.*"—And the next clause is: "If my daughter Elizabeth shall *die without children, then and in that case, after the death of Elizabeth A, as aforesaid,* I give the land *to my brothers and sisters, their heirs and assigns forever.*" The circumstances in this case, superadded to the expression *die without children*, are strong enough to warrant the construction that the death without childr.n,

was to be *at the death of Elizabeth*. The word used is *children*, the first class of issue.

The gift to the children of Elizabeth is expressly "*after Elizabeth is done using it, and at Elizabeth's death.*"

The words following the expression, die without issue, are, "*then*," "*and in that case*," "*after the death of Elizabeth A., as aforesaid.*" Showing, independently of the words, die without children, that the death of Elizabeth, was the definite period contemplated by the testator.

Lord Chancellor Thurlow, in the opinion which we have cited, 1 Br. Ch. Rep., 190, said, the words "leaving,"—"and after" go far towards overturning the rule." Here we have the words, "after the death of Elizabeth A., as aforesaid," which are equivalent to "on the death of Elizabeth," so that then, and at no other time, the estate is to go over by the will.

To make it more sure, the words, *as aforesaid*, are added, referring to the limitation to the children of Elizabeth in the preceding clause, which was "*after Elizabeth is done using it, and at Elizabeth's death.*"

Another circumstance is, that the devise over is to his brothers and sisters, who were living. The devise over, therefore, was to persons in being, and to take effect in their life-time: Kemp *vs.* Daniel, 8 Georgia, R. 385. This is a circumstance which has been held to make good the devise over, ever since the case of Pells *vs.* Brown, Croke James 590. There it was, if Thomas should die without issue living William, then over to William. So here, it is really, if Elizabeth should die without children living his brothers and sisters, then over to them and their heirs, that is, to

them in fee—the words, their heirs, being not words of purchase, but showing the quantity of interest.

In the case of Pinbury *vs.* Elkin, 3 P. Wm., 564, Lord Hardwicke states the several senses in which the words "dying without issue" are used. In that case the testator "gave his wife all his goods and chattels, provided that if *she shall die without issue by the said testator*, then after her decease, £80 shall remain to the testator's brother, J. S." His Lordship says, "But by the third sense of a person's dying without issue, is intended *without leaving issue at the time of his death*, and in this sense the words, dying without issue, shall be taken in the principal case; which indeed seems to be the natural meaning of these words: for, taking the case to be that J. S. dies leaving a son, and afterwards that son dies without issue, and one should ask any gentleman (not of the bar,) whether J. S. died without issue? It would be naturally, truly, and properly answered, No; J. S. did not die without issue, but left issue a son; but that son is since dead without issue, so that *now* J. S. is dead without issue; for the words, die without issue are relative to the death of the party, and it is plain that at J. S.'s death, when he left a son, he did not die without issue."

This decision related to a bequest of personal property; but it shows clearly the true, natural construction of the words, and how they would have been construed when applied to lands, as well as when applied to personal estate, but for the old precedents which grew up under the statute *de donis*, when the policy of the English law even, was quite different from that of the present English law, and wholly unlike that of our law from the beginning. It is evident, that if Lord Hardwicke had been a Judge in the State of Ohio,

in the year 1856, he would not have hesitated to construe these words as importing a definite, and not an indefinite failure of issue.

In the case of Forth *vs.* Chapman, 1 P. William, 664, "Walter Gore devised a leasehold to William Gore and Walter Gore during the term, and if either of them died and left no issue, then over."

Lord Chancellor Parker said, "If I devise a term to A., and if A. die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended, if A. die without leaving issue *at his death*, and then the devise over is good; that the word, die, being the last antecedent, the words, without leaving issue, must refer to that. Besides, the testator who is *inops concilii*, will, under such circumstances, be supposed to speak in the vulgar, common and natural, and not in the legal sense."

In the case of Nichols *vs.* Hooper, 1 P. William, 199, the Court say, "But where a legacy is given by will, to commence upon this contingency, viz: If J. S. shall die without issue, this shall be taken according to common parlance; if J. S. leaves issue, he does not die without issue, and it cannot be intended that the testator designed whenever there should be a failure of issue of Thomas, (which might be 100 years hence,) that then these legacies, which were meant only as personal provisions, should take effect."

In the case of Hughes *vs.* Sayer, 1 P. William, 534, John Hughes gave personal estate to Paul and Anne Hughes, children of a deceased brother, and upon either of them dying without children, then to the susvivor, and if both should die without children, then to the children of the testator's other brothers and sisters."

The Court said, "the word, children, when unborn, had been construed to be synonymous with *issue*, and therefore would in a will create an estate tail; and if the word, children, was understood to be the same with *issue* in the present case, then the devise over of the personal estate upon a death without issue would be void; but that here the words, dying without children, must be taken to be *children living at the death of the party*. For it could not be taken in the other sense, that is, whenever there should be a failure of issue, because the immediate limitation over was to the *surviving devisee*, and it was not probable that if either of the devisees should die leaving issue, the survivors should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure forever."

The statute *de donis*, with the general policy of the law on which it was founded, came with our ancestors to the American colonies, and the decisions of the older states were much influenced by it. But we propose to analyze some of the cases in the American courts, most of which, though not all, have been cited by Messrs Worthington & Matthews in their brief.

The courts of no State have gone farther in following English precedents on this subject than those of New York, and the New York cases are much relied on by the plaintiff's counsel.

A leading case in that State is that of Fosdick *vs.* Cornell, 1 John. R., 449. The language of the testator was:

"If any of my sons or my daughters shall happen to die without heirs male of their bodies, then the lands shall return to the survivors, to be equally divided between them."

"Thompson, J., says, from the whole will taken together, I cannot entertain a doubt that he meant to provide, that in case any of the devisees named in this clause should die without leaving male issue at the time of his death, his portion should be divided among the survivors."

Referring to the case of 1 P. Williams, 534, he says:

"The only difference between the two cases is, that the one relates to *personal*, and the other to *real* estate, which, it is contended, requires a different rule of construction, according to the adjudged cases. I find no distinction, however, with respect to the effect which the words, surviving devisee, or any other words, or parts of the will, are to have in ascertaining the intention of the testator. It is true, that in the case of Forth *vs.* Chapman, 1 P. Williams, 667, the Lord Chancellor thought the words, "leaving no issue," ought to receive a different construction when applied to real, than when to personal estate; that, as to the former, the words *ex vi termini*, ought to be considered to mean *an indefinite failure of issue, and as to the latter, a failure of issue living at the death of the first taker.* The soundness of this distinction has been much questioned."

*In* 3 *John. R.* 292, the testator gave "all the remainder of his real and personal estate to his six children, (naming them,) share and share alike; but if any one or more of his said children should die before they should arrive at full age, or without lawful issue, then his or their share should devolve upon and be equally divided among the rest of his surviving children and their heirs." Four of the six children died, leaving children, and then a fifth died, leaving none at his death."

Spencer, J., said, "Though the real and personal estate

are both given in the same manner, it would be violating the plain intention of the testator, to consider this a void limitation over, because the personal estate might admit of other constructions; and since the case of Fosdick *vs.* Cornell, it cannot be contended that the devise means an indefinite failure of issue, but only a failure of issue living at the death of the first taker."

"Kent, J. This devise over is good by way of executory devise, and not too remote; for the construction is well settled, that the words, 'without lawful issue' mean, issue living at the time of his death."

10 John. R. 14. "And if any of my sons aforesaid shall die 'without lawful issue,' then let his or their part be divided equally among the survivors, unless it should happen that he or they so dying, should leave a wife behind, in which case she shall take back what she brought with her, and £100 besides, and only the remainder shall be divided as aforesaid."

Kent, Chief Judge, said, "And it ought to be observed, that the Courts have generally shown a disposition and leaning towards giving effect, if possible, to these testamentary limitations, and have laid hold of any words that would admit of a construction to take the case out of the general rule, so as to give effect to the executory devise."

"The words, *leaving issue* have, in many cases, been deemed sufficient to change the operation of the will, and to show that the limitation was meant to be confined to *issue living at the death* of the first taker, and so valid, as an executory bequest. The words, *no issue behind him*, and the words, *in default of issue, then, after his decease, to B*, have been considered as of decisive weight in support of this construction." Judge Kent, in the same case, considers the question,

whether the phrase, "dying without issue," should have the same construction in a devise of real as in a bequest of personal estate, and shows the authorities both ways.

Afterwards, singularly enough, Chancellor Kent, in Anderson *vs.* Jackson, 16 John R., 382, changed his mind, and expressed the opinion, that he had been in error. But the Court of Errors took a different view of the subject, and held him to his former opinions.

In that case, (16 J. R., 382,) the testator devised land to two sons, and, that, if either should depart this life without lawful issue, his share should go to the survivor, and in case of the death of both without lawful issue, to his brother and sister, in England, and their heirs. This case is cited by the plaintiffs. But the Court held, that the words did not create an estate tail, especially since the statute abolishing entails; but was a good limitation over in fee, by way of executory devise, to the survivor, on failure of issue living at the death of either of the sons."

The Chancellor (Kent,) and Senator Hammond gave extensive opinions against the validity of the devise over, discussing the numerous English authorities. But the opinion of Yates, senator, sustaining the devise over, was adopted as the decision of the Court. He said, "I hold it to be a well settled rule of construction, that the terms used in a will are to be understood in their popular sense, unless opposed to some rigid, unbending rule of law. Now, no one can hesitate for a moment, as to the meaning of the testator in the case before us. He clearly intended, that if either of his sons should die without lawful issue, the survivor should take the whole which was devised to both; and the only question is, whether there is any inflexible,rigid

rule of law to wrest the plain and manifest intention of the testator to a purpose altogether different from what he intended. I am unacquainted with any such rule; nor do I consider the cases cited, when collectively taken, to establish such a position. But, if there are any such cases, let it be remarked, that the policy and genius of the British Government are, in some respects, opposed to our own; they encourage and support estates tail, as being important in forming family settlements; they always lean in favor of the eldest son, as heir at law; and to oust the devisee, they invariably incline to maintain some of the features of the feudal system, which are so intimately connected with the splendor of a monarchy, and the wealth and dignity of an overgrown nobility. On the contrary, it is the policy and genius of our republican institutions, to consider all the children of a parent as placed on an equal footing, and to discountenance an aristocracy of wealth and influence."

It is, therefore, only the dissenting opinions which countenance the point made by plaintiffs' counsel. The case is against them.

In Benton *vs.* Patterson, 8 Georgia R., 146, the testator devised his estate to his three daughters. And by codicil provided that, "In the event of the death of either of my daughters, *without issue*, it is my will and desire that their proportion revert to and become the property of the survivor or survivors." Held, that the will did not create an *estate tail*, especially since such estates were long since abolished by law in Georgia, but the same was an estate for life in the daughters with remainder in fee to their children and grand-children; and if the daughters died without children or grand-children, it was a good limitation over in fee, by

way of executory devise to C. E., on failure of increase at the death of the daughters."

In the same volume is the case of Kemp *vs.* Daniel, p. 385. The testator devised as follows: "To my daughter Celia, I give and bequeath, and to the heirs of her body, the following named negroes," &c. "Should she have no heirs from her body, she is to have the use of said negroes her life-time, and *at her death*, should she die without any heirs from her body, the four named negroes above, and their increase, to return to *my son John*, as his property, *or to his lawful heirs*."

The Court say, "Here the testator's daughter is to have a *life estate* in the negroes, and *at her death*, should she die without any heirs from her body, the four named negroes and their increase are given to John B. Bailey, the testator's son, a person *then in life*, which negatives the idea that the testator intended by the words, 'heirs of her body,' an indefinite failure of issue."

It is to be observed of this case, the words, "*at her death*," together with the fact that the limitation over was to his son John, who was then living, "or to his lawful heirs," were held sufficient to take the case out of the rule of indefinite failure of issue.

Both these circumstances exist in the case at bar. The phrase, "at her death," and "after her death as aforesaid," are used in the will of Andrew Ferris, and the devise over is to his brothers and sisters, [who were then in life,] and their heirs.

In Carlton *vs.* Price, 10 Georgia, 495, the testator gave "to his son Robert, and at his death to the lawfully begotten heirs of his body, certain negroes; nevertheless, if the said Robert should die without an heir, then the negroes to be set free *at his death*."

Held, a good executory bequest. The words, "*at his death*," were considered sufficient to show that a definite failure of issue was intended.

The Court said, "if there was no one in life answering the description of 'heirs of his body' to take the property, then '*at his death*,' she made a *final disposition* of it, which conclusively rebuts the idea that the property was to be tied up, and descend to the *heirs general* of her son Robert, in succession, without any restriction as to time."

Here, again, the phrase "at his death," connected with the devise over, was held sufficiont to fix that, as the time when he died without "heirs of his body."

The Georgia cases happen to turn upon the same kind of expression, added to the words, "die without heirs or issue," with those contained in the will of Andrew Ferris. Each of the three clauses of the will of Mr. Ferris, which refers to the property in question, contains a distinct and emphatic reference to the *death* of Elizabeth, as the time which is to determine one estate, and begin another.

The first clause gives the use of the lands to Elizabeth "*during her natural life*," and adds, "to have full use and control of the same *as long as she shall live*."

The next clause limits the same property "to Elizabeth's children (if she should have any heirs) after Elizabeth is done using and occupying it, *and at her death*." And the next and last clause, "If my daughter Elizabeth shall die without children, *then, and in that case*, I give the land to *my brothers and sisters after the death of Elizabeth A., as aforesaid*." That is, "*at her death*," as in the preceding clause.

Besides, the devise over is to persons in being, his brothers and sisters, in the same manner as the prop-

erty was limited to John Baily in the case of Kemp *vs.* Daniel.

We have thus, not without risk of fatiguing the patience of the Court, analyzed some of the circumstances which have been deemed sufficient to make the failure of issue definite. And we insist, that the additional words and circumstances of this will, beside the phrase "die without children," are sufficient to fix the death of Elizabeth as the time when the executory estate was to commence, and that if she had no children then, the estate went over to the brothers and sisters of the testator.

But it is important, in the second place, that the Court should settle the rule of construction, where the phrase dying without issue stands unaided by additional words, or circumstances.

The old common law of England, and the old decisions of English Courts, form the basis of our Ohio common law. And yet there are many principles of that ancient system, and many of those ancient decisions which do not suit our institutions, nor our times, and therefore form no part of our law. It would be erroneous to say, that the principles of the English common law, or even the ante-revolutionary decisions of the English courts, were entitled to the same authority here in Ohio, as in Westminster Hall. They must be adapted to the general policy of our laws, and must not conflict, directly or indirectly, with our legislation, or they are without authority.

The doctrine, which construes the words, "dying without issue," as implying an indefinite failure of issue, even in England, is opposed to the legal judgment of the present time, and is upheld only by the force of precedent. Is it to be tolerated, that the courts of

Ohio, which have so recently commenced the work of constructing a system of jurisprudence suited to our own country and age, shall now, for the first time, adopt an antiquated rule, which would be introduced, at the present day, nowhere else?

The cases cited by plaintiff's counsel, to show that the fee vested in the child of Elizabeth at its birth, and that the devise over to the brothers and sisters was cut off, all turn on the doctrine, that, to die without issue or without children, &c., implies an indefinite failure of issue, and that the death of the first devisee is not referred to. The idea of cutting off the devise over, by the mere birth and death of a child of the first devisee, before the devisee's death, would never have been entertained any where, but for the doctrine of the indefinite failure of issue above referred to. The two ideas, viz: that of the indefinite failure of issue, and the alternative contingent remainders, after a dying without children, belong to one and the same theory, and if that theory is wrong, both of these ideas are wrong. The whole theory is overthrown by the true and natural, and we say, the legal construction of the words, which makes a man *die* without children, *when he dies*, and not *before, nor after.*

A case much relied on by the plaintiffs' counsel, is Goodright *vs.* Dunham, 1 Doug., 264. Thomas Laming, the testator, being entitled to a remainder in fee, expectant on a life estate, devised as follows, viz: "I give my messuage, (describing the premises) to my son Jeffrey, for his life, and, after his death, unto all and every his children equally, and to their heirs, and in case he *dies without issue*, I give the said premises unto my said two daughters, and their heirs, equally to be divided between them." After the death of his father

and of the tenant for life, Jeffrey entered and suffered a common recovery to the use of himself in fee; and died without ever having had children. Held, that Jeffrey took an estate for life, with contingent remainders to each of his children, and a contingent remainder over to the testator's daughters, and that the recovery cut off all the remainders, and vested the fee in Jeffrey, the devisee, for life.

This case was decided in 1779, three years after American independence. The rule in Shelly's case, and this rule of indefinite failure of issue, were in full force. By the rule in Shelly's case, a devise of a life estate to the father with remainder to his heirs, or the heirs of his body, created a fee, or a fee tail in the father; and the difference, if any existed, between such a remainder, and a remainder to "all and every his children and their heirs," was so slight, that it is not very surprising that the court should be willing to let them suffer the same fate, and give the father the same advantage by a common recovery, which he would in the other case have by an artificial construction of the court. The construction given by the court to this will may fairly be considered a branch of the rule in Shelly's case, and founded on the same policy. That rule forms no part of the law of Ohio. It has gone, and with it has gone, it is to be hoped, the policy of restricting the power of making wills, by arbitrary and forced constructions. Our statutes require that the intention of the testator should be carried out, where it does not seek to create a perpetuity. 14 O. R., 383, Brewster *vs.* Benedict, opinion of Hitchcock. The warranty deed, here, takes the place of the English common recovery. Under the authority of Goodright *vs.* Dunham, (if that case governed the case at bar,) Elizabeth might by

deed have cut off her own children, as well as the brothers and sisters of Andrew Ferris, immediately after his decease, and given the whole to a stranger; making the will in fact no better than so much blank paper. While we do not admit, that, that case is identical with the case at bar, we say, that it is not law in Ohio; but, that the construction was against the obvious sense of the words, and could never have been given, by the Supreme Court of Ohio.

The language of the will, however, is substantially different from that of Mr. Ferris' will, and can not furnish a precedent for its construction. There is no express reference to the death of the first devisee, as the time when the devise over to the daughters was to take effect, by words added to the words dying without issue, and the words used were, die without issue, which had uniformerly been construed to point to the indefinite failure of issue, and not the words "die without children," which had not received such a construction. And although the court held, in that case, that issue should, so far as the creating an estate tail was concerned, be construed to mean children, yet it does not follow that the decision in that case would form a precedent for construing the effect of the words, "dying without children," as to its bearing upon the question, whether the birth and death of a child before the death of the first devisee, should cut off the devise over to the collaterals. There was no child born in that case, and, although the Judge said, *obiter*, that the words "die without issue," were to be construed to mean, "without having had children," that was not a point in the case. The remainders to the children of Jeffrey, and to the daughters of the testator, might be contingent,

though the contingency might not happen till the death of Elizabeth.

The case of Caskey *vs.* Brewer, 17 S. & R., 441, cited under point 18, of plaintiffs' brief, is not on the point of alternate remainders at all, but simply affirms the doctrine of implying an estate tail in the first devisee, from the words, "die without issue," leaving a remainder in fee to the second devisee. This case seems to disregard the superadded words which, both in England and in New York, are held to point to a definite, and not an indefinite failure of issue.

So the case in 12 *Gill & J.*, 83, cited under the same point, refers only to the general doctrine of indefinite failure of issue. The case in 10 Yerger, 292, also cited under the same point, does not apply at all to this case, as the child outlived the devisee, on whose death, without issue, the estate was to go over. Just as if Elizabeth, in this case, had died before her child. The child would undoubtedly have inherited a fee. Such was the case in 10 Yerger, 292.

The case in 1 Salkeld, 224, Loddington *vs.* Kime, also cited under the same point, was nearly similar to the case in 1 Douglas, 264; but in 3 Lev., 431, where this case is also reported, it is said that after the Court had agreed to a decision, Powell, J. started the other point, whether the devise over to B. was not an executory devise instead of a contingent remainder, upon which it was twice argued, and before any judgment, the parties settled the case by compromise.

1 Ld. Raymond, 203, 208, is another report of Loddington *vs.* Kime.

2 Wm. Blackstone, 777, is similar to that of 1 Douglas, 264. But there was no child born in this, or in either of the preceding cases, and no remark made as

to the vesting of the remainder before the death of the first devisee; or construing without issue, as meaning without having had issue. The decisions were simply that the first devisee took a life estate, and the devisees in remainder were contingent.

In the case of Doe *vs.* Tonnereau, 2 *Doug.*, 504, a father had settled an estate for life on his eldest son Thomas, by deed, and by will gave the "reversion to the heirs male of Thomas' body, and in default of such issue, to his second, third, fourth and fifth sons successively, in remainder, one after another, and to the several heirs male of the bodies of said sons, and for want of such issue to his right heirs." Thomas, the eldest son, after the death of his father, levied a fine and recovery to dock the entailment, and cut off the remainders. Thomas died without issue. But it was held that the rule in Shelly's case did not apply; that the recovery was inoperative; and that the devise to Thomas in tail of the reversion was a good executory devise, and that the devise over to the second son in default of the heirs male of Thomas, was a good executory devise; vesting either *in possession*, on the death of Thomas without leaving issue male, or as a remainder after an estate tail, on his death, leaving issue male. Lord Mansfield in his opinion, said, "There are two ways, in form of law, in which this last limitation may take effect. 1. If Thomas dies, leaving issue male, then the estate to the second son takes effect immediately, as a remainder expectant, which may be barred by a recovery. 2. Suppose the other alternative, (which really happened), that Thomas has no son, *then it is an executory devise to the second son, if Thomas at his death leave no issue male.* This is within the limits established by law to prevent perpetuities." "An obvious

objection to the alternative in this case is, that, if the limitation over is a remainder, it can not be turned into an executory devise. *That* is true, if it ever vest as a remainder. But here it might, or might not, upon a contingency; and it never did. 2. So, in Hopkins *vs.* Hopkins, Lord Talbot decided, in support of the intent, that a limitation, which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. This he did upon principle, without precedents; and a great estate is now held under his determination. 3. Brownsword *vs.* Edwards (2 Ves. sr., 249) is another strong instance where it was held that a devise may operate either way, according to the event. These are the authorities which go along with the principles I have stated, and enable us to support the intention of the testator. As to *that*, there is no doubt that he meant to give successive estates in tail male."

Here it is to be observed, the gift was to the heirs male of Thomas' body, and for default of such issue over to the second son. The Court held, that if Thomas had left a son living at his death, the devise to the second son would have operated as a remainder, contingent; but if he should die without such *issue living at his death*, it operated as an executory devise, and could not be barred.

Lord Mansfield, in 1780, went that far to sustain what he considered the intent of the testator. If then, this Court should be of opinion that, as a contingent remainder, this devise over to the brothers and sisters could not be sustained, we submit that the case last cited would be authority for construing it an executory devise and good, as Elizabeth "at her death, left no children." And we do not see how the plaintiffs derive

any countenance from the case, as an authority; nor does the note on page 504, to which reference is had, settle anything in this case. It only defines three classes of limitations.

In Right *vs.* Creber, 5 *B. & C.* 866, testator devised a life estate to his daughter, remainder to the heirs of the body of his daughter, their heirs and assigns forever. The daughter had one child at the death of the testator, and afterward had eleven. Held, that the first child took a vested remainder at the death of the testator, subject to open and let in after-born children. Here was no devise over, nor any contingency to happen, before the vesting of the estate of the children, except their birth. The words "heirs of the body," were in that case construed to mean children, to carry out the intent of the will.

In Hutchinson *vs.* Stephens, 15 Eng. Chy. 240, the devise was in trust for the testator's grandson, Henry Tripp, for life; remainder for the child or children of H. T., at their ages of twenty-one years; but in case H. T. should happen to die without leaving any lawful issue of his body living at the time of his decease, then over.

H. T. had a daughter, who lived above the age of twenty-one years, and died in his life-time, leaving children who survived him. Held, that those grandchildren of H. T. took the estate, as heirs at law of the daughter.

The only difficulty in the case was, that there were no words of limitation in the devise to H. T's. children, but it was followed by the words, "in case H. T. should happen to die without leaving any issue of his body living at the time of his decease," then over.

It does not appear to be a contested case. But the

Court seemed to be of opinion, that when the daughter became *twenty-one years of age* the estate vested in her, and then, as H. T. did not die without issue, no question arose in the case. The issue were the heirs.

In 11 Eng., 60, the testator, who died 1779, devised to his daughter, Henrietta, a life estate, remainder to the use of all the children of Henrietta, (in case she should leave more than one child), as tenants in common. But in case Henrietta should *have* only one child, he gave the estate to that child and his or her heirs and assigns forever. Henrietta had two children, who died before her, but left issue, who survived her. The Court, by what they seem to acknowledge to be a forced construction, p. 63, held, that the children of Henrietta took a fee absolute. That was a construction given, however, of the meaning of the will, from language in the will different altogether from the will of Andrew Ferris; and that construction could not, therefore, be considered authority to bind in this case, if the decision were made, which it would not have been, in America. The case is obscurely reported, and does not seem to have been very seriously contested. The limitation over was, "in case Henrietta should die without leaving any issue," which the Court held, had not happened, because, though her children were dead, she had a grandchild who survived her. Therefore, the Vice Chancellor, who gave the opinion, decided, that the event on which the estate was to go over, viz., dying without issue, had not happened; and the will stood as if that limitation had not been made. The devise was, "unto and for the use of all and every the children of her body in fee." The limitation failing, by Henrietta leaving issue, a grandchild, the Court held, that the first devise took effect in favor of the children,

when born, precisely as if the limitation over had not been inserted.

The case of Foster *vs.* Hayes, in 20 Eng., 72, and 30 Eng., 267, is very much relied on by the plaintiffs, and is a strong case in favor of their doctrine, quite too strong to be law in the State of Ohio. Wm. Harding, on the 8th of January, 1788, devised an estate to his grandson, Matthew Hayes, for life, with remainder to the children of said grandson, in fee, *and for default of such issue*, to the children of the brothers and sisters of the testator, in fee. The will contains a similar devise to Wm. H. Hayes and his children. Then follows a proviso, that if either of said grandsons should happen to die without issue, the estate devised to him should go to the survivor.

Matthew Hayes had a child, Elizabeth, who died before him, and Wm. H. Hayes died without ever having had children.

The Court held, that the words, "for default of such issue," meant, "without ever having had such issue, viz: children;" and that the proviso was to be referred to the same kind of issue, and was not intended to change the event on which the estate was to go over, but only to provide for survivorship between the two grandsons and their children, before the estate should go over to the children of the brother and sister of the testator.

It is to be observed, that the will of William Harding, which was the subject of decision, in 20 Eng., 72, and 30 Eng., 267, as well as the will of Thomas Prentice, which was adjudicated in 11 Eng., 60, was an ancient will, made long before the modern act, by which the rule of construction, as to the indefinite failure of issue, is changed, was passed. It is also to

be remarked, that the phrase, "in default of such issue," is different, and may well bear a different construction from the phrase, "die without children," so that a decision founded on one could not fairly be taken as authority for the construction of the other. It is further to be considered, that the English Courts, by establishing the rule in favor of construing the words, "dying without issue," and the like, to refer to an indefinite failure of issue, and so void, are compelled to restrict the construction of the limitation over, to the objects of the former grant, and to hold that the children took a vested estate in fee, to save the will from the worse disappointment of having the limitation over, held void altogether.

If the language of the proviso in the case of Foster *vs.* Hayes, had been construed to refer to issue, generally, as it literally imported; then, as the Court could not, under the will to which we have referred, limit the failure of that issue, to the *death* of the first devisee, the event becomes too remote. The only construction, therefore, by which the Court could save the limitation over, at all, in any such case, was to say that the estate was to go over, in the event of the first devisee never having had any children, which would happen, if at all, in the lifetime of the devisee, and so would not be too remote. If, on the contrary, that Court had been at liberty to give the words their natural construction, by referring the failure of issue to the time of the death of the first taker, there would have been no occasion to pervert the language of the testator a second time, to escape, in part only, the bad consequences of the first and principal perversion.

It is argued, that this construction saves the interests of the grandchildren, which might otherwise be

lost contrary to the intention of the testator. But there is no occasion for any such laborious circumlocution, to save the intention of the testator. If it be the intention of the testator, we are seeking, we have only to take a direct course, and adopt a plain, natural, sensible construction: and, when, by the term "children," the devisor intended to include grandchildren, or lineal descendants, living at the death of the first devisee, we ought to say so, directly, and not adopt an artificial theory by which the intention in that particular is saved, while in another respect it is defeated, as the English Courts have been constrained to do, by the ancient, and highly artificial, theories of their feudal estates.

Of all the *American cases* cited by the counsel for plaintiffs, I find none which sustains their idea of alternative contingent remainders, as claimed in this case. The only cases having any reference to, or bearing upon the question, are against them.

19 Conn., 107, Smith *vs.* Pendell: Testator gave his property to his granddaughter, Elizabeth, for life, but if she should die, leaving no natural heirs, to E.'s mother, Hannah, to be her own," &c.

Hannah quit claimed to Elizabeth, who afterward died without children.

Held, that the devisee held the property by virtue of the release of Hannah.

In this case, it is to be observed, that the Court had no difficulty on the question, whether the devisee over after the "dying leaving no natural heirs," was valid. It was treated as unquestionable, though the interest was contingent and executory.

The cases in 3 Wendell, 503, and 12 Wendell, 84, 92, are not at all in point for the plaintiff. They are

cases where, though the life estate was devised to the father, and a fee tail to the heirs of the body of the father, it was held that the rule in Shelly's case did not apply, as it was against the intent of the testator. It might have been different, the Court say, in England where estates tail are favored; but in New York, where they are forbidden, they will not be presumed, unless the *manifest intention* requires it.

How different it might be in England, from this American view of the doctrine of wills, may be seen by a remark of Lord Chancellor Cranworth, in 31 Eng., 133, Coape *vs.* Arnold.

The Lord Chancellor, on page 141, says, "I must not be understood as at all impugning or questioning the doctrine, that the rule in Shelly's case does not depend upon, and cannot be controlled by, the *intention of the testator or settler*; if the estates created are such as to bring the rule into operation, the rule will prevail, even against a declared intention to the contrary."

This is certainly a very strong view of these rules of construction, founded on mere opinions of Courts, limiting, at least, if not repealing, the statute conferring power to make wills.

In 9 Paige, 265, Macomb *vs.* Miller, the testator gave to his daughter a life estate, and then a fee to her children, and if *she should die and leave no lawful issue*, over to his collateral relatives. She afterward married, and had a daughter, who lived twenty-two years, and died in the lifetime of her mother, the first devisee, who was then past bearing children. Held, that the limitation over, was after the indefinite failure of issue, and void, and that the fee vested in the child when born, and descended to the mother, on the child's death. The

devise over being void, there is no objection to the remainder vesting in the child at birth. The idea of alternative contingent remainders did not arise at all, because the limitation over was after the indefinite failure of issue, and void.

This was a plain consequence of the English doctrine, that, to die without issue, is indefinite and uncertain as to time. If the failure of issue must be considered indefinite as to time, it may as well happen before as after the death of the first taker. But we say that in Ohio, (so it would now be in New York), the words *dying* without issue, or without children, designates the death of the first taker as the time when issue is to fail, and so is definite.

This is the same case with 26, Wend, 229.

In 5, *Paige*, 512, The testator devised to his daughter, for life, remainder in fee to his two sons, in case of the death of his daughter without leaving any child or children, or of the death of such child or children *without lawful issue*, then over. The first devisee had a child at the death of the testator. Held, that "or" must be construed "and;" and that the devise over was after an indefinite failure of issue, and so, void. That being held, it was not difficult to hold, that the child of the devisee, (who was even living at the death of the testator), had a vested interest. But this case can not be considered as authority, as the limitation over was after an event which, by all the authorities, was too remote, and therefore, void, and the remainder had no where else to go, but to vest in the child, which was in life at the death of the testator. The contingency on which the estate was to go over was not the death of the first devisee without lawful issue, but the death of the first devisee's children, (of whom some might

be unborn,) without lawful issue. That is beyond the time allowed by the statute.

In Pond *vs.* Bergh, 10, Paige, 140, the testator, who died in 1789, leaving two sons and five daughters, devised lands, (page 143), to his son P., and his heirs, and other lands to P. and A., and their heirs; "and if one of his sons should die without issue, or if both should die without issue, his or their share should go to the reviving son, and his five sisters, their respective heirs and assigns, each an equal portion forever."

P. died in 1839, without issue, having survived his brother A., and his five sisters, all of whom had issue living at the death of P. Held, '*reviving*' was 'surviving,' and the limitation over was after a definite, and not indefinite failure of issue, and was good; and that the issue of A. were entitled to a sixth, though A. died in the lifetime of his brother. To effect the intent, the Court supplied, after the words, "reviving son," the words, "*or the son who has died and left issue, who are then living.*" Pages 150, 153.

It is to be observed in the case of Pond *vs.* Bergh, that though the devise over was to the *surviving* brother and sisters, and their heirs and assigns; that survivorship amounts to no more than the survivorship of the brothers and sisters of Andrew Ferris; for the will was to their heirs and assigns in both cases, and in that case they never took as survivors, the fact being that *they* did not *survive;* but their heirs took. Besides, the sisters were not named in the first devise, but only in the devise over. They were, however, in esse, as were the brothers and sisters of Andrew Ferris. All the difference between that case, so far as the five sisters are concerned, and our case, is, that the word "surviving"

was not used in our case; but actual survivorship, was was held, in that case, not to be necessary.

The case of Wood *vs.* Wood, 5, Paige, 596, is cited by plaintiff's counsel, but how it bears on this case we have not been able to perceive. That was a will to the brother of the testator, in trust for the benefit of testator's three children, until they should severally attain twenty-one years of age, with cross remainders, if they died before coming into possession of their several shares without issue, and with remainder to their heirs of the blood of the testator, if they all died before that time without issue: Held, that the limitation over to the heirs was void, as too remote, because it was after three lives, whereas the statute of New York makes two lives the extent to which the power of alienation can be suspended.

The case of Carpenter *vs.* Schemerhom, 2 Barb. Chy. R., 314, has no bearing on this case. The testator devised the property to his six children, each a sixth, for life, remainder after the death of each; of one-sixth to the children of the deceased; and it was held, that the grand children took vested remainders as they were born, subject to open for after-born grandchildren. This is quite plain, and it is not easy to see how it could be otherwise, but it does not affect the case at bar.

The case of Rogers *vs.* Rogers, 3 Wend., 503, relates wholly to the rule in Shelly's case, and bears in no manner upon the case at bar.

The case of Sisson *vs.* Seabury, 1 Sum., 236, is a "devise to A. and his male children, and their heirs for ever, to be equally divided amongst them and their heirs for ever." The testator had no children when he made his will. Held, that A. took a life estate, with contingent remainder to the children. The remainder

must, of course, be contingent, until the children were born. The case, however, has no bearing on the question at issue in this case.

In Wright *vs.* Barry, 7 Cushing, 105. Testator gave to his daughter, a life estate, and at her death gave the same to her children. "But all the foregoing grants and bequests are given her only, during her natural life, and then to descend to her child or children, their heirs and assigns forever; but if she should leave no child, then to be equally divided among my grandchildren; it being my intention to entail as far as my grandchildren." His daughter had two children, Hugh Hall, and Mary, living at the death of the testator, and when the will was made. Held, that the daughter took an estate for life, with remainders to her children in fee.

This will was made before the revolution. The two children survived their mother, and then Hugh died, leaving Mary, his sister, his sole heir.

"Upon the construction of the will, the Court were of opinion, that the daughter took an estate for life, with a remainder in fee, to the two children; that they took vested remainders subject to open and let in after born children, if any. But no other child was born — They, therefore, upon the decease of their mother, took an estate in fee, in equal shares.

"In the manner in which the words are used, 'If she should die, leaving no child,' then over, the devise clearly means; not, if she should die leaving no issue, looking to an indefinite failure of issue; but as the term naturally imports, leaving no child, i. e., *leaving no child* to take the estate in remainder, after the devise to the mother for life. But if she did leave any children,

then the devise over had no effect, and such children, by force of the devise, took a fee."

The case of Baker *vs.* Lorillard, 4 Comst., R. 257, is also cited by the plaintiffs' counsel, as a leading authority, under their 18th and 22d points, relating to the idea of alternative contingent remainders, vested by the birth of a child.

This case involves the construction of two wills. One was the will of Elijah Pell, which had been already adjudicated, in 9 Paige, 265, and on appeal in 26 Wendell, 229, which, therefore, the Court do not review, but treat as *res adjudicata*. This case, therefore, so far as Elijah Pell's will is concerned, and that of 9 Paige 265, and that of 26 Wend., R. 229, are all one and the same case. And, we presume, that it is for this part of the case, that plaintiffs' counsel cite it as authority. But the chief object of this case of Baker *vs.* Lorillard, was to give a construction to the will of Thomas Pearsall, which contains a provision similar to that of the will of Elijah Pell, but in the construction of which, the very distinction was taken, and the doctrine established by the highest Court of New York, which we claim to be the law of the case at bar.

Thos. Pearsall died in 1807, devised "the *use and improvement*, of various houses and lots to his grandson, Duncan P. Campbell," and added, "I give unto my grandson full power to dispose of the before-mentioned real estate by will to any or either of his children, if he shall leave any, or to his grandchildren, and for want of such child or children, the estate shall descend to his son, Thos. C. Pearsall, and his heirs."

Thomas, the son, died after his father, leaving children. Duncan P. Campbell, the grandson, had eight children, and was still living (1845). In 1825, Camp-

bell, then having five children, under an order of Court, sold the property in fee for the benefit of himself and his children—the proceeds to be invested and the interest to go to him during life, and afterwards the fund to go to the children. The question was, as to the validity of the title of the purchaser; and the point of the case chiefly considered, turned upon the construction of the above recited clause of the will of Thos. Pearsall. The Court say, (Harris, J:) "To me, it seems very manifest, that the testator looked forward to the time of the death of his grandson, for whose benefit, primarily, the property was intended, as the period when the title should finally and absolutely vest. He gave the use of his property to his grandson, and then to his child or children." He meant that Campbell should have the benefit of it, so long as it could be useful to him, and then, if he should die leaving descendants, that the property should vest in some, or all, of these. To this end, he gave his grandson full power, by a testamentary disposition, to determine who, among his children, who might be living at the time of his death, should, and who should not, take the property."

"But Campbell was then young and unmarried. He might never marry. He might have no children, or his children might die before the period for them to take the property should arrive. These contingencies were not lost sight of by the testator. He, therefore proceeds to declare, that in case his grandson should die without leaving children or granchildren to take the property, it should descend to his son, Thomas C. Pearsall, and his heirs. Thus it was provided, that upon the death of Campbell, whatever else might happen, an absolute title to the property, in fee, should vest somewhere."

"Campbell, upon the death of the testator, took a life estate in the property. But in whom did the remainder vest? It must reside in somebody. When Campbell took his life estate, somebody also took the remainder in fee. Campbell, as yet, had no children to take it. Where, then, did the remainder go? Campbell's children, upon their coming into being, *took no vested estate*. The most that can be said, is, that they took a contingent remainder, limited upon the event of their surviving their father." "There cannot be two legal fees in the same land, says the learned writer, from whom I have already quoted. (Hayes' Essay on Estates Tail, 81). But it is clear that a *vested* remainder in fee, and a *contingent* disposition of that remainder to take effect in a given event, may co-exist." "I think the legal effect of the will was to vest the remainder in fee, in Thos. C. Pearsall, at the time the life estate vested in Campbell—that such remainder vested, subject to its being *wholly divested*, upon the happening of the contingency upon which it would vest in the children or grandchildren of Campbell. That contingency is not, merely, the birth of such children. It includes survivorship also. A double contingency must happen before the remainder vested in the ulterior devisee, will be divested. Children must be born, and they must survive their father."

"But, let it be assumed that the sale under the order of the Court of Chancery operated to convey to Baker, all the contingent interest, which all, or any, of the children of Campbell had, or ever could have, in the premises conveyed, there is yet another difficulty to overcome in making a perfect title to the property. Thos. C. Pearsall, or his heirs, had, if not a vested remainder, at least a contingent remainder in the premises."

Though not very probable, it is quite possible, that Campbell may survive all his children and grandchildren, and if he does, the estate goes over to the heirs of Pearsall. It cannot be pretended that this possibility has been in any way extinguished."

Bronson, Ch. J, says: "I agree with my brother Harris, that the decree should be reversed, but can not follow in all the steps by which he has reached that result. As I read the will of Thos. Pearsall, having regard to the rules of law applicable to the case, the conclusions at which I have arrived, are, that the testator gave an estate for life, not a fee tail, to Duncan P. Campbell; remainder in fee to the children, (or children and grandchildren—it is not important in this case to say which,) of Campbell; with an executory limitation over to the testator's son, Thomas, in case Campbell should leave no child (or grandchild) living at the time of his death."

"The first born child of Campbell took a vested remainder in fee, subject to open and let in after born children (and grandchildren;) and subject to be defeated by the execution of the power of appointment.

The plaintiffs cannot give a good title to the land for several reasons. 1. Should Campbell survive all his children, (and grandchildren,) the estate in remainder will go to the testator's son, Thomas, who was not a party to the sale in 1825."

Another important case, cited by the plaintiffs' counsel, is Morgan *vs.* Morgan, 5 Day's Rep., 517, which we consider an authority in favor of our construction of this will. The testator, in that case, "devised real estate to his four sons in fee, and if either should die without children, his brothers should have his part in equal proportion." John Morgan, one of the sons, had

a son, who lived thirty-five years, and died before his father. John became insolvent, and the land was sold under execution, to pay his debts. Held, that, by the words, "die without children" was intended, a dying without children living at the death of the first devisee."

The ground taken by the counsel, favoring the vesting of the fee in the child who was born and died before the first devisee, were the same with those taken by the plaintiffs' counsel in this case. They claimed that the devise over was void, and if not, it was a contingent remainder, and cut off by the birth of a child.

The opinion of the Court is a strong one on the whole subject.

Edmonds, J. said, " the words, 'die without children,' admitting them to have the same legal import as 'dying without issue,' when standing alone and not opposed to any other clause in a will, do not, necessarily, import an *indefinite failure of issue;* or, indeed, anything more than dying without children living at the time of the devisee's death. This is the true and natural import of the words.

Where the words, " dying without issue" have relation to a bequest of chattels only, this construction will not be questioned. Where such words relate to the disposition of freehold estate, a different rule of construction has, in some instances, obtained."

" Dying without issue" has been held as applicable to a freehold estate, to mean an indefinite failure of issue, and the reason of the distinction is, said Buller, J., " that Courts of Law always lean in favor of the vesting of estates." 3 T. R. 494. How far this construction is warranted by reason and policy, in the country where it has been adopted, it is not necessary, in this case, to decide. Suffice it to say, that, Judges of the

first respectability in England, can scarcely be reconciled to it."

"If we consider, for a moment, the reasons usually assigned, why the intent of the testator is to be favorably regarded, viz., that wills are so often made in extremis, by men unlettered, *inops concilii, &c.*, it would be strange, indeed, to find a Court avowedly governed by such reasons; construing the words of an unlettered testator, in one case, where personal estate only is concerned, according to their natural, obvious and grammatical import—according to the common sense of mankind, and the plain intent of the testator; and, in another case, where real estate is the subject of consideration, solemnly giving to the same words, a construction directly opposed to the known and manifest intent of the testator, and such an one as would never have entered into the imagination of any man not an adept in the most abstruse and difficult branch of legal science; as was the case of Beauclerk *vs.* Dormer, 2 Atk., 308, where Ld. Hardwicke said, there was no doubt about the intention of the testator; but thought himself bound to make a decree contrary to that intention, and for no better reason expressed, than because the legal import of words is different from the natural one. In such a case, is it too much to say, that a will so construed, is the will of the Court, and not the will of the testator." The whole of the opinions of the Court in that case are important, and bear pointedly on the case at bar.

In the case of Morgan *vs.* Morgan, 5 Day, R., 523, the case above cited, the precise question, raised by the eighteenth, twenty-first, and twenty-seventh points of plaintiffs' argument, is considered and decided. On page 523, Edmonds J. says, "As to the second point,

insisted on by the defendant, viz.: that if the words, "die without issue," do not intend an indefinite failure of issue, but are controlled by other words, limiting the contingency to the death of the first taker, then, the obvious intention of the testator was, to limit the estate over, in case either of his sons died, living the others, without (having had) children, and not *without* children living at the time of the first taker's decease; and that on the birth of John's son, the contingency on which the limitation vested had utterly failed, as respected his part of the estate; it appears to me a forced construction, and I can find nothing in the will to support it. In the mind of the testator, had he foreseen the event of the birth and death of a grandson, without having had children before the death of his father, the same reason would have existed for designating the person or persons to succeed to the estate, as would be, on the death of either son without children living at the time of the son's death.

Therefore, to adopt the construction contended for, would defeat an important provision manifestly intended by the testator, by adding the last clause of the will, viz.: the disposition of either son's part, in case of death without children then living. Without this last clause of the will, on the death of a son without children then living, his portion would not go, exclusively, to the surviving brothers, but to the heirs at law, and the sisters might come in for a share; and the same would be the case, although such son might have had children who died without issue before the father. In the one case, therefore, as well as in the other, it would be equally expedient and desirable to the testator, to limit the share of either son, on his decease without children then living, to the surviving brother; and looking at the

plain import of the words used, and the intended object, I think there can be no doubt on this subject."

"Finally, I am of opinion, that the plaintiff's title to the premises is good, by way of executory devise; that the contingency on which the limitation over rests, is not too indefinite and remote; that by the words used in the last clause of the will, is intended *a dying without children living at the death of the first taker;* and that, on the death of John, his part vested in the surviving brothers, as tenants in common." The other Judges, among whom was Chief Justice Reeves and Judge Swift, concurred unanimously. The Supreme Court of Connecticut of that day comprised as much learning and as exalted legal ability as any Court in the country.

The Courts of Ohio are not predisposed to follow to their extent the decisions of the Courts of England in their forced construction of wills. In the case of Brewster *vs.* Benedict, 14 Ohio Rep., 383, the Court say, "And it is equally apparent, that it was his intention, in the event of the death of either of his sisters and their children, without issue, that the portion of the estate allotted to such deceased sister, should be equally divided between the remaining brother and sister; or in case of their death, then between their children, taking *per stirpes.* It did not enter into his mind that, by his will, any part of his estate was to go to strangers. Now, is this intention to be defeated by any rule of construction heretofore adopted? And here I must be permitted to say, that these rules, in most cases, are applied not for the purpose of ascertaining, but of defeating the intention of a devisor or testator. In this State, however, we are required by statute, to carry out his intention; and, I presume, no such statute would have been

passed, had it not been supposed that these antiquated rules of construction were too much regarded by our Courts."

The Courts of Ohio have not presumed to follow the English Courts in all their ingenious reasonings, by which the true intent of the testator has been defeated, or if they have sometimes followed these subtle theories, they have afterward broken the spell and abandoned them.

In the great case of King against King, although the Supreme Court, at first, in 12 Ohio Rep., 390, made a full English application of the rule in Shelly's case, in the 15 O. R., 567, the same Court, on a bill of review, reversed their former decree, and carried out the unequivocal will of the testator. Judge Lane states the will in that case, "to contain the following provisions:

1. A devise of real and personal property to Christian King.

2. After his death, to the heirs of his body.

3. But if he die, leaving no heirs of his body, then to be divided equally among his sisters' children. The question was, whether it fell within the rule in Shelly's case, and Judge Lane decided in favor of the rule, following the English authorities.

But in the 15 O. R., 561, the same case coming up on a bill of review, the Court receded from their former construction, which defeated the intention of the will, and carried out its real purpose. The Court say, "What then was the intention in this case? To ascertain this, we must look to the words and the motives of the devisee. We must not start out with the presumption that it was the design of the testator to create an estate tail, and construe the words of the will to effect that object. That was only a family law in Eng-

land, designed to build up families, cheat creditors, and prevent forfeitures, and is in no wise consistent with the spirit and genius of our own government and laws, or the habits and feelings of our people. Our statute forbids it, and such, I believe, is the case in all, or very nearly all, the States in this Union. Nor is there with us, any disposition to strain a point to bring a case within the operation of the rule in Shelly's case; a rule which had its origin in feudal tenure, and was first adopted to secure to the Lords the profits and perquisites incident to inheritance; and, as an afterthought, the additional reason, that it was necessary to prevent an abeyance of the fee. It is, at best, a mere artificial technicality, and just in proportion as it lacks reason, it appears to have won upon the affections of the profession. In its simplicity it possesses some sense, and to that extent we have adopted it, as a rule of property in Ohio. But it is a high and imperative duty of this Court to conform its judicial decisions, where we attempt to walk by the light of precedent from another country, to the nature of our own government and free institutions.

Throwing aside, then, all presumptions in favor of estates tail, and all peculiar affection for the rule in Shelley's case, and attempting to arrive at the intention of the testator, from the language employed, and the nature of the devises contained in the will, what must we say was the intention of the testator?"

The Court were no longer willing to regard the artificial, if not absurd, sophistries of the English Courts, more than the manifest intention of the testator. The facts of that case were closely analogous to this. The intention of the testator, King, was almost precisely the

same in principle with that of Andrew Ferris. The clauses in question were:

"*First.* I will and bequeath all the property I may be possessed of before my decease, to my brother Christian, to be used by him while he lives.

"*Second.* And if it so please God, that, at the time of brother Christian's decease, he should be possessed of legal heir or heirs, born in lawful wedlock, I then will and bequeath all and every kind," &c., "to such heir or heirs, and no other.

"*Third.* But should I myself die without lawful heirs, and also my brother Christian die without heirs born lawfully as above stated, I then will what may be considered my brother's share at my decease, and not before, to my two sisters' children."

Our statute, abrogating the rule in Shelly's case, had not been enacted when that will took effect. The decision of the Court, therefore, shows the tendency of judicial opinion in Ohio, independently of the legislature, on those artificial rules, by which the intentions of testators had so often been disappointed.

There was no ground to doubt that the testator, Thomas King, intended by his will, to give to his brother Christian, a life estate only, and a remainder, after his death to Christian's children, if he should have any living at his death; and if himself and his brother Christian should both die without lineal heirs, then over to his sisters' children.

But there were two, if not three, judicial difficulties presented themselves. First: the rule in Shelley's case, (not the will) gave the fee to Christian. Secondly: the testator had ignorantly used the word heirs, a word of high technical import, instead of children. And, thirdly:

he had used substantially the same dangerous phrase which Andrew Ferris had used, "should my brother Christian *die without heirs.*" The advocates for these "antiquated rules" had three rules to stand upon, against the true intent of the will. The technical meaning of the word "heirs," and the rule in Shelly's case, and the rule sought to be applied to this case. They relied on the two former as the strongest and most universally acknowledged. The Court, however, gave the obvious and true construction to the word "heirs," and refused to follow the Shelly rule against the intention of the will. They found no difficulty with the clause "dying without heirs," and so the testator's will was not disappointed.

We are not embarrassed with the Shelly rule in this case. The Legislature have removed that fiction from the contemplation of Courts.

Our Legislature have, likewise, abrogated estates tail, which have been, and are still, so fondly cherished by the Courts of England. The general tendency of the Legislature of Ohio, as well as of the decisions of the Courts of Ohio, has been to carry out the intention of the testator, so far as the same can be done, without creating illegal perpetuities. Our Courts and Legislatures have more and more rejected the judicial perversions of the language of wills, by which the real intent of the testator has been defeated; and where the Courts have persisted in following one of these antiquated rules of interpretation, the Legislature has interposed to save the true intent of the testator from the stubborn constructions of the English Courts, founded mainly on the general policy, in that country, in favor of estates tail. The result is, that no decision has ever been made in Ohio, by which an estate tail

has been raised by implication, on the words, "dying without issue;"—and the words, "dying without issue," have never, in this State, been held to refer to any other time than the *death* of the devisee.

It is to be hoped, that the Legislature will not be called upon to interpose and prevent the adoption, in our Courts, of a rule of interpretation, which wrests the language of a testator from its natural meaning, only to make the will violate the law, and then defeat the intent altogether.

Nor is there in Ohio, any such judicial reason for the adoption of the rule, which implies an estate tail, from the words, "dying without issue."

By our statute of 1812, no real estate "can be given by deed or will, to any persons, but such as are in being, or to the immediate issue and descendants of such as are in being, at the time of making such deed or will; and all estates given in tail, remain an absolute estate in fee simple, to the issue of the first donee in tail."

No estate tail can be created beyond the issue of the donee in tail; and that is not beyond the power of granting estates by deed or will, without entailment.

In England, and in those States where entailments are allowed, there may be a show of reason to imply an estate tail, from the words, "dying without issue or without children." But, in Ohio, the just inference is directly the other way. It is neither logical nor judicial, to presume that a testator intends to violate the law of the land, by creating an estate which is expressly forbidden, and made impossible. Such a presumption would make a testator violate the law, against his evident intent. It would, by construction, make him attempt an impossibility, against his own desire. It would be a forced inference, both against the intent of

the will, and against the law. No further legislation can be necessary to enable the Court to carry out the intent of the testator in cases, like the present. A construction, such as the plaintiffs claim, would be against the spirit of our legislation, on the subject of wills and of descents.

The law of entails has prevailed in many of the States of the Union. That policy has been as much fostered in Virginia, as in any of them. And, yet, Kentucky has never adopted the rule. It has been pressed upon the Courts of that State, without effect; till in a very late case in the 14 *volume of B. Monroe's Reports, p.* 662, Daniel *vs.* Thomson, the Court, after long deliberation and several arguments, came to the unanimous opinion to disregard the construction given by the English Courts to the words "die without issue," or "die without children," and held that the true and natural and legal construction of those words was the same as the words, *die without issue living at the death of the first devisee.* This case arose upon a will made before the passage of the Statute of Kentucky, expressly requiring that construction of like words. That case, therefore, stood before the Court of Errors of Kentucky, as the present cause stands before the Supreme Court of Ohio.

The opinion in the case is the most elaborate and able opinion on the subject of this rule, which we have met with, whether in the reports of this country, or of England. Judge Marshall, who delivers the opinion of the Court, analyses the numerous leading cases, English and American, on the subject, with great care.

After discussing the abolition of the law of entails, in Virginia, as well as in Kentucky, and its effect upon the construction of the words, "if he die without

issue," and other like phrases, the Court say, (14 B. Monroe, 701.) "It may have been impracticable for the Courts of Virginia, called upon at short intervals to give construction to the words, " if he die without issue," or other similar expressions, to give effect to the general considerations which tended to displace the presumption of an intention to create an estate tail, or to use the words in question in any other than their natural sense. They did not even feel at liberty to give effect to words and circumstances in the will itself, which other Courts have decided sufficient to restrict the sense of the words, "if he die without issue," to the death of the person referred to. The consequence was, that the Legislature of Virginia, in 1819, passed an act declaring that those, and other similar words in wills, &c., thereafter made, should be interpreted as referring to the time of the person's death, unless a contrary intention clearly appeared in the instrument. Similar statutes were enacted in other States, in which a similar course of decisions had been pursued; and even in England, where all of the same causes did not operate to produce a change in the use and sense of the words, a statute of like import was passed in the first year of the reign of the present Queen. It is impossible to suppose that these statutes were passed for the purpose of fixing upon these particular words, a new and arbitrary meaning, different from that in which they were commonly used, or in which they expressed the real intention of the parties who might use them in wills and other instruments of conveyance; on the contrary, these enactments prove that however proper the technical or artificial interpretation of the words may once have been, it had become, by change of times and circumstances, antiquated and

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inapplicable, and that by a continued adherence to it, notwithstanding this change, the Courts were, in most instances, rather defeating than effectuating the intention of the testators and others, and were thus perverting the primary objects of judicial construction. They prove, too, and the same is proved by the constantly renewed contests in the Courts of England and Virginia, upon the effect of the words, "dying without issue," and of other words and circumstances supposed to qualify them, that even in those countries, where from year to year, and by decision after decision, the Courts reiterated the judicial interpretation of the words, as drawn from ancient and continued precedents, they had not been able to stamp that interpretation upon the minds and transactions of men of new and more enlightened generations, or to enforce, amid the great and constant changes of institutions, and laws, and manners, and language, a continued use in the same artificial sense, of a particular formula of words not appropriate to legal proceedings, nor peculiar to them, and therefore not properly technical, but appropriately and accurately used by common men in the description of an ordinary natural event, which is understood by all. Although the authority of this interpretation may never have been expressly disclaimed in this Court, it has constantly been evaded in regard to wills made since 1776, (when the act abolishing entails was passed,) by seizing hold of circumstances deemed sufficient to establish the natural sense of the words. The judicial interpretation has, in some of these cases, been pronounced to be unreasonable, and it has never been applied with the effect of raising an estate tail, or of destroying any part of the will. The circumstances which have operated to overthrow

this unnatural interpretation, even when it was firmly established, have, together with other co-operating causes, prevented it from having ever been established here. It cannot be regarded as a rule of property here, because it has never been established or recognized as such by this Court; never has practically operated as such in actual transactions, and never has been known as such, even to the legal profession, much less to the community at large. We have eason to know that the learning, and even the common rules on the subject of estates tail, are almost entirely dropped from the regular study of the profession, and that but few practicing lawyers bestow any attention upon them, until their engagement in a particular case may occasionally render it necessary. It has even been urged in argument, that some of the judges, who have decided upon the question of estates tail, had but little acquaintance with the subject, and, doubtless, it may be shown that the decisions of the Court are not in accordance with the weight of British and Virginia authority—but, our researches, made principally in reference to this case, convince us, that although there may have been no diversity in the British adjudication, as to the meaning and effect of the words "if he die without issue," when found in a devise of real estate, and unrestricted by other words or circumstances, there is great diversity upon almost every other point connected with the subject.

Shall we go, then, to these decisions, which have never operated here, to find a rule of property founded on an interpretation of particular words, which has never been practically applied here, which is unknown to the community, and contrary to the natural sense and common use of the words among us? And shall

we do this for the purpose of destroying a will, on the ground that its devises, valid according to its terms as understood among ourselves at the present day, are void, according to the interpretation put upon the same terms, eighty or five hundred years ago, in another country, under a different state of law and usage, and never judicially applied, nor practically adopted here? Such a resort, with such a result, would, in our opinion, not only contravene the prior decisions of this Court, and shake the rules of property which they have declared, but would be deriving our rule of property upon this subject, from principles and sources inapplicable to our condition and laws, and would operate to the surprise, as well as to the injury, of our citizens. The rules of property, which are of extensive practical operation, and intended to govern the transactions and rights of individuals, must be based upon the common notions, and accord with the common understanding of the community. The interpretation now urged upon us, is contrary to the common sense of all unlearned men. It is impossible for them, and difficult, even, for lawyers, to comprehend how, or why, the words, "if he die without issue," should be taken to mean "whenever his issue shall fail, at or after his death," or how a man, who has died once leaving issue, can ever afterwards be said to have died without issue. Experience proves, that the men of the present century, will not be governed by this rule. The judicial power of England and Virginia, where it had been long established, could not maintain it, and it would be unjust to attempt, now, to introduce it here. We do not admit that it is, or ever has been, a rule of property in Kentucky, as applicable to wills, made since 1776, and to declare it so now, would be to introduce a new rule."

"The argument that a legislative act is necessary to authorise the Court to give a restricted interpretation to the words in this codicil, so far as it is founded upon the statutes relating to estates tail, is answered by the construction which has been heretofore impliedly given to it, and which, in this opinion, has been expressly given. If the Court had heretofore regarded that act as binding them down to the interpretation which these words had received before October, 1776, or if it had in a train of decisions adopted that interpretation, a legislative act might have been necessary here as in other States, to authorise or to declare a change of the rule; and we have no doubt that if such decision had been made, or if the attention of the legislature had been called to the subject at any recent period, such an act would have been passed. As no such decisions have been made, no legislation was necessary to authorise the Court to exercise its power of construing not only wills, but the act of 1796 itself, according to the ordinary rules of construction, and, under all the considerations which may properly bear upon the subject, among which the construction which it has heretofore impliedly given to the statute, cannot be lightly regarded."

"If, as we have decided, we are not confined to decisions made before October, 1776, the past revolutionary cases, which have been stated, furnish additional ground for the conclusion, that the word, "leaving," with the other circumstances referred to above, are sufficient to restrict the contingency to the time of C. R. Thomson's death. And, as the cases decided by this Court seem to establish the principle, that every circumstance which shows that the testator, in using the words, "if he die without issue," looked to, and intended to provide only, for the case of a failure of issue, at the time of the

devisee's death, would suffice to restrict the contingency and the devise over to that time, we should. in any view of the question, feel authorised to decide, upon our own conviction of what the testator intended, that the contingency was sufficiently restricted in this case by the words of the contingency themselves, in connection with other circumstances and considerations already adverted to.

"But we are conscious that a decision of the case on this ground would be placing the rule of property, so far as it depends upon the interpretation and effect of the words, "if he die without issue," under the discretion of the Court, and the variable opinions and feelings of its judges, some of whom might think these words sufficiently restricted by words or circumstances, which others would consider as wholly inadequate; and at any rate no man would know, or could tell, the nature of an estate which depended on the interpretation of these words, until there had been a decision on the particular will on which the question might arise. To make a rule certain and stable, it must either be decided that the words must be taken in their natural sense, unless a contrary intention is plainly expressed, or that they must be taken in the sense of referring to an indefinite failure of issue, unless expressly and conclusively restricted to the death of the devisee, or unless restricted in the precise manner which has previously been adjudged to be sufficient. This last alternative would deny to present and future judges the power which their predecessors have exercised, of judging for themselves, what words and circumstances sufficiently indicate an intention to restrict the contingency, which we should deem to be inadmissible. And between the other two alternatives we are prepared to decide, for

reasons which have already been indicated, that the words, "if he die without issue, or without leaving issue or heirs of his body," or other words of similar import, are to be interpreted according to their plain, popular, and natural meaning, *as referring to the time of the person's death*, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes. This conclusion accords substantially with that expressed in the former opinion, and we may refer, in confirmation of its propriety, to the fact that in the revised statutes, passed since the former opinion was delivered, and which is the first revision of the statutes in the present century, the legislature has fixed the meaning of the words, "if he die without issue, or heirs of his body," and other similar expressions, occurring in wills and other conveyances thereafter made, as referring to the time of the death of the person spoken of, unless a contrary intention clearly appears, etc. Which proves that we have adopted the correct interpretation of the words, as understood and used by the community. And the effect of our decision is to apply the same uniform interpretation to wills made before, as to those made after the enactment of the statute."

Without adding more on this point, we will recur for a moment to the objection urged on the part of the plaintiffs, that our construction would leave the grandchildren, if there had been any, of Elizabeth, out of the benefit of the will, so that if she had had a child who lived to marry and have issue, and then died before her, such issue would not take, though they should survive her. The fair construction of this provision, includes grandchildren and lineal descendants, under the term children. The counsel for the plaintiffs,

themselves, so consider it in their 30th point, where they declare that, "the phrase, dying without children is identical with the phrase, dying without issue." In other cases, the Courts have felt no difficulty in extending the term children to grandchildren.

But the English Courts have in this class of cases excluded grandchildren, from the term children, for the reason that that was the only way in which the limitation could be preserved at all under the blind rule of construction, that the phrase, dying without issue was not to be taken as referring to the definite time of the first devisee's death, but to an indefinite failure of issue, which might happen a century hence. Considering that the question, whether a man had any *children* would be determined in his lifetime, they seized upon that word, where it happened to be used, and construed it strictly, excluding grandchildren and all other issue, so as to save in part the intention of the will, making the limitation in one contingency, valid and operative, and so not altogether void.

In view of the whole case, we can perceive no sound reason why an Ohio Court should be constrained to disregard the intention of Andrew Ferris, as shown in his will. There is nothing in that intention, as we construe it, which violates the law or policy of the country; and no law, and no policy of the law is preserved or promoted, by the adoption of the construction claimed by the plaintiffs.

Of the intention of the devisor, we cannot entertain a doubt; so that the case is reduced to the simple question, whether the intention of the will shall be observed and carried out, or be made to yield to an antiquated, artificial rule of construction, which sprung up and prevailed under the peculiar circumstances of a former age,

which have long since ceased, and in another country, of widely different laws and institutions.

We claim, therefore, that Andrew Ferris, intended, by his will, to devise to his daughter Elizabeth, a life estate in the lands, and, after her death, the fee to her children or lineal descendants, if she should have any, who should live so as to be her heirs; and, if she should die without issue living at her death, then to his brothers and sisters and their heirs. This intention, we claim is lawful. It violates no statute, and infringes no cherished policy of the country.

We ask a decree of the Court, giving the title of the lands, in the petition described, to the defendants, according to the construction aforesaid.

TAFT, KEY & PERRY,
GEORGE R. SAGE,
for Def'ts.

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# Supreme Court of the United States.

**December Term, 1862.**

**No. 114.**

ELIPHALET FERRIS AND OTHERS
*vs.*
THE LESSEE OF JOSEPH C. PARRISH. } *Error.*

**ARGUMENT FOR THE DEFENDANTS.**

CHARLES P. JAMES, of Counsel for Def'ts.

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### ARGUMENT FOR THE DEFENDANTS.

The judgment in Parrish's Heirs *vs.* Ferris and others, 6 Ohio State Rep. 573, as stated in the Record, page 44, is conclusive against the plaintiff's claim of legal title in this action.

Thomas A. Parrish, as plaintiff in that case, (under whom the present plaintiff claims as heir,) alledged that he was "in possession, holding the same as absolute owner in fee simple, and with the legal title thereto," of the premises sought in this action. (Record p. 26). He further alledged in his petition, that these defendants claimed to have some estate or interest in the described real estate adverse to him. (Record p. 26). His prayer was in the following words:

"The Plaintiff prays that the said defendants may be compelled to show what estate or interest in the said real estate above described, they or any of them claim to have; that the Court will determine and declare that the said defendants, nor any of them, have any valid interest or estate in the said premises; that the Court will order *the title of the plaintiff* thereto, and his possession thereof, *to be established* and quieted, and the said defendants to be perpetually enjoined from disturbing the same or setting up any claim adverse to the plaintiff, thereto, and for such other relief as the nature of the case may require." (Record p. 26.)

To this petition two answers were filed. In one of these (Record p. 29), a part of the defendants deny that the petitioner held the premises "as absolute owner, in fee simple, and with the legal title thereto," and after setting forth in substance, the will of Andrew Ferris, they state that the premises belonged to them under that will, and conclude with a prayer "that the plaintiff may be adjudged to have no claim to said premises, and that the Court may adjudge to these respondents the share of said premises to them justly belonging."

In the other answer, (Record p. 34,) the other defendants make the same denial that the plaintiff was the absolute owner, in fee simple, of the premises, or that he has any right to the possession thereof. They then set out the provisions of the will of Andrew Ferris, and conclude in these words: (Record p. 36.)

"Wherefore, and in consideration of the premises, de-

fendants show that the plaintiff has no right or legal claim to the property described in his petition: that the same, lawfully and according to the true interpretation of the will of Andrew Ferris, deceased, belonged to the defendants and the other lawful heirs of his brothers and sisters, parties defendant to plaintiff's petition, and the possession thereof, is unjustly and wrongfully held from them by the plaintiff. And the defendants ask for judgment accordingly; *that the petition of plaintiff be denied*, and he be ejected from the said premises; and that the Court adjudge to these defendants thereof the shares thereof to them justly belonging."

The plaintiff filed several answers to these counter-claims of the defendants. In the first of these answers, after admitting all the facts stated by defendants, in their answer and counter-claim, he says: (Record p. 38.)

"The plaintiff further states, that the said Elizabeth A. Parrish, the wife of the plaintiff and daughter of said Andrew Ferris, having survived her only child, who died without issue, by her last will and testament, duly admitted to probate and record in this county, devised all her real estate and personal estate to this plaintiff, his heirs and assigns forever. *Wherefore*, the plaintiff insists the said defendants have no interest in the said real estate, and are not entitled to the relief sought in their said counter-claim, and the plaintiff demands judgment against them as prayed for in his petition."

In answer to the counter-claim of the other defendants, (Record, p. 38–9,) he admitted in detail the facts as to Andrew Ferris' will, the marriage of Elizabeth, birth and death of a child during her lifetime, and then states the devise by Elizabeth to himself. He then denies that defendants have any interest in the said real estate, "and demands judgment against them as prayed for in his said petition.

Upon these pleadings and an agreed statement of facts, the Supreme Court of Ohio found all of the facts of the of the case, (Record pp, 42, 43, 44,) and thereupon conclude as follows: (Record p. 44.)

"The Court further *find*, that, by the true and legal construction of the will of said Andrew Ferris, deceased, his said daughter, Elizabeth A., *died without children*, and that the fee of said property did not rest in said Elizabeth A. in the death of her child, or at any time; *and that no estate, or interest whatever in said land, passed by her will to her husband, the said Francis A. Parrish;* and upon said counter claim, the Court do further find, that, upon the death of said Elizabeth A., the devise over, contained in the fourth clause of the will of said Andrew Ferris, deceased, took effect.

"The Court do, *therefore*, order and adjudge that the petition be dismissed." etc.

These proceedings were had under section 557 of the Civil Code of Ohio, which is in these words:

"An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

It is manifest that, in this action, the plaintiff, in order to have the relief sought, is *compelled* to show, not only that he is in possession, but that he has such a title, whether it be legal or equitable, as to require the Court to determine and end the adverse claims of the defendants. His petition would be demurrable if he simply stated that he was in possession. If he seeks to determine the adverse claims of defendant on the strength of his *equitable* right to the property, he must state and prove that equitable title. If he seeks similar relief on the strength of a *legal* title in himself, he must state and prove that title. In every case he *puts in issue* the title on which he asks the relief.

If the question of the plaintiff's title must be put in issue, certainly the Court must decide it, in order to render any judgment. The Supreme Court of Ohio was obliged to decide whether Francis Parrish had the title which he asserted, in order to determine whether it must grant him relief or dismiss his action.

It is assumed by one of the learned counsel for the plaintiff (argument of Mr. Pugh, p. 19,) that the action provided by this section is similar to the ordinary suit in equity upon a bill of peace. He observes:

"The petition filed by Francis A. Parrish, on the 13th of July, 1853, resembles a bill in equity to compel the release of an outstanding title or claim. The defendants had brought an action of ejectment, at common law, to obtain *possession* of the premises. What Parrish desired, manifestly, was to avoid a trial of that action, and to prevent the bringing of another. But, as we all know, Chancellors have frequently refused a decree for the plaintiff, in such cases, *without intending to decide against his title*, or even his right to be relieved at a future time. The oldest authority on the subject, (*Earl of Bath* v. *Sherwin*, *Prec. in Ch.*, 261,) is where Lord Cowper refused an injunction after five trials at law, and as many concurrent verdicts; although, upon appeal, the House of Lords granted the relief sought. (1 *Bro. Parl. Cas.* 266.) In England, at this day, it is not usual to ask any such decree before a second trial."

Mr. Worthington appears to regard the action under the Ohio Code in the same light.

The grounds and the methods of the two proceedings are as different as possible. In such suits for injunction, to quiet title, Courts of Chancery did not hold it competent for them to sit in judgment upon the legal title of a complainant, as an *original* question, presented there for the first time. When they interposed to restrain an ejectment, it was not on the ground that *they*, having examined the title, found it valid, but on the ground that it had been

so satisfactorily vindicated at law, that the complainant should no longer be persecuted with litigation. When they refused to interfere, it was on the ground that complainant had not so established his title at law, as to have *an equity* to be delivered from persecution. They declined to go into the merits of his title as an original question.

The authorities upon this subject are numerous. 2 *Story's Eq., sec.* 859.

By the 557th section of the Ohio Code, a party in possession, who has never been subjected to litigation, is enable to apply for relief, and the Court is obliged to address itself to enquire, not whether he has established his title elsewhere, not whether he has endured litigation enough, but, (in case he asserts a legal title,) whether that title is valid. This is made the very question which the Court is competent to examine, and which it must decide. The Judges in Ohio cannot follow the example of the English Chancellor, and decline the enquiry into the question of the legal title, if such a title be asserted as the ground for an injunction.

I submit, then, that the 557th section of the Civil Code clearly required Parrish to put his claim of legal title in issue, and required the Court to *decide* upon it.

The petitioner in Parrish's Heirs *v.* Ferris and others, 6 Ohio State Rep., 563, did, *in fact*, put in issue his legal title, and the Court did, in fact, decide upon it.

His title was propounded in the original petition, and was denied in the answers. The *source*, also, from which he pretended to derive his title, was stated by him in his answers to the counter claims of defendants. Printed Record, pp. 25, 38, 39.

The plaintiff's claim of legal title was, in fact decided upon by the Court: first, in the judgement *finding* that he had no legal title; secondly, in the judgment ordering a dismissal of his action.

For the form of judgment in which it is proper to embody a decision of a point, under the Civil Code of Ohio, this Court will look to the tribunals of Ohio. I presume it will accept the *finding* of that Court, upon the question of title, as an authoritative form of judgment.

But, whatever may be said of the finding, the final order and judgment of "dismissal" was, under the provisions of the Civil Code of Ohio, necessarily a judgment upon plaintiff's claim of legal title.

Section 372 of the Civil Code provides as follows:

"An action may be *dismissed* without prejudice to a future action.

"1. *By the plaintiff*, before the final submission of the case to the jury, or to the Court, where the trial is by the Court.

"2. *By the Court,* where the plaintiff fails to appear on the trial:

"3. *By the Court,* for the want of necessary parties:

"4. *By the Court,* on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with dilligence:

"5. *By the Court,* for disobedience by the plaintiff of an order concerning the proceedings in the action.

"*In all other cases, upon the trial of the action, the decision must be upon the merits.*"

The cases in which the Court might dismiss an action, *without prejudice* to a future action, are specified. In all other cases the dismissal is necessarily upon the merits, and *with prejudice.*

This provision precludes a comparison between a judgment of "dismissal," under the Ohio Code, and a common law judgment of "non-suit." (Argument of Worthington and Matthews, p. 58.)

A decree of dismissal of an ordinary bill in Chancery, after hearing, is held to be a decree on the merits.

Wilcox *v.* Balger, 6 Ohio Rep. 406.
Loudenbach *v.* Collins, 4 Ohio St. R. 260-1.

In Parish's Heirs *vs.* Ferris and others, 6 Ohio State R. 563, the question of plaintiff's legal title was decided *directly* and not *collaterally.*

Smith *v.* Kernochen, 7 How. U. S. 198.
Parker *v.* Kane, 22 How. 17.
Hibshman *v.* Dulleban, 4 Watts 191.
Blackham's Case, 1 Sulk. 290.
Rex *v.* The inhabitants of Knaptoft, 2 B. & C. 883.

The cases in Watts, Salkeld and Barn & Cress, are referred to as showing when a matter can be said to be collaterally decided.

It can hardly be said that a point comes *collaterally* into a case, when it is the *legal ground* on which relief must be granted or must be refused; and we are not driven to *infer* that it was decided when it appears by the Record, that the relief asked could neither be granted nor refused without deciding it.

For an example of decision made out only by *inference*, I beg leave to cite remarks of the Court in *Evans* v. *Birge*, 11 Geo. 265.

Having demonstrated that the judgment in 6 Ohio 563, was a decision directly upon the plaintiff's claim of legal title, we insist upon that judgment as conclusive of his want of legal title in this action.

Counsel for plaintiff concede quite as much as we need to claim upon this point. Mr. Pugh, in his argument, (p. 21) says:

"As to the doctrine of estoppel, by judicial determination, it is not enough that the right now in controversy, between the plaintiff and the defendants, was considered, or argued, or even decided, by the Supreme Court of Ohio, in dismissing the petition of Francis A. Parrish, at December term, 1856. *The Record must show that judgment could not have been rendered, in manner and form as it was rendered, without determining the very question*—or, in other words, that the issue joined by the parties, in that action, was the same issue, substantially, as the parties have joined in this action."

I submit that it has been sufficiently shown, that in the action provided by sec. 557 of the Civil Code of Ohio, the Court *could not* dismiss Parrish's petition, without deciding whether he had the legal title which he claimed in it, and could not refuse him a judgment if it found his title good. Had that Court sat *in Chancery*, without any statute defining the subject of its enquiries and the grounds of its action, it might have entered a decree of dismissal, without determining whether the plaintiff had a legal title.

I beg leave to refer the Court to several authorities, as showing clearly that the former judgment is conclusive.

Duchess of Kingston, 11 State Trials 261.
Smith *v.* Kernochen, 7 How. U. S. 198.
Parker *v.* Kane, 22 How. 1.
Remarks of Mr. Justice Campbell, p. 17.
Stockton *v.* Ford, 18 How. 418.
Bank U. S. *v.* Beverly, 1 How. U. S., 134.
Wright *v.* Deklyne, 1 Peters C. C. R. 202.
Lawrence *v.* Vernon, 3 Sumner 20, 23.
Lore *v.* Trueman, 10 Ohio St. R. 45.

Grant *v.* Ramsey, 7 Ohio St. R. 162.
Loudenbach *v.* Collins, 4 Ohio St. R. 261-2.
Gardner *v.* Buckbee, 3 Cowen 120.
Wood *v.* Jackson, 8 Wend. 9.
Doty *v.* Brown, 4 Comst. 71.
White *v.* Coatesworth, 2 Selden 143.

It is unnecessary to multiply cases on this principle. As was remarked by the very learned Chief Justice Gibson, in *Hibshman* vs. *Dulleban*, 4 *Watts* 190, "the law, with its distinctions, has been compressed into the dimensions of a nut shell, by Chief Justice De Gray, in the Duchess of Kingston."

Counsel for plaintiff seem to rest their whole case, as to estoppel, upon the notion that only an *equitable* right, (namely the right of injunction) was passed upon in 6 Ohio, while a legal right (namely, possession) is in issue in the case at bar. In a word, they make the *relief* to be had the issue, and deny that the right, out of which the two forms of relief were to spring, constitute an issue. The cases abundantly show that the *ground* on which the relief is to be had constitutes *the matter tried* by the Court. The relief is only the remedy applied, after the Court has decided the matter tried.

In the former case, Parrish's proposition was: "I am the legal owner of this land, and therefore I claim the remedy of injunction." In this case it is: "I am the legal owner

of this land, and therefore I claim the remedy of being put in possession." In each case the Court is called upon to try the same right, namely, his legal ownership, in order to determine whether to allow the remedies respectively demanded.

I do not feel at liberty to comment *seriatim* upon the cases cited, on this question, by plaintiff's counsel, but may be permitted to refer to several on which they appear to rely with special confidence.

In *Hickey* v. *Stewart*, 3 *How.* 750, where the legal title was sought, it appeared that only an *equitable* title had been claimed and decided upon in the former suit. The decree in its favor did not convert into a legal title. So in *Speed* vs. *Broxdell*, 7 *Monroe* 571. Of course a decision upon an equitable title does not conclude enquiry into a legal title. The same remarks will apply to *Gibson* vs. *McNeely*, 11 *Ohio St. R.* 131, where a legal title was claimed: the former judgment of dismissal was held not to be a bar, because the *estate* sought in that case was equitable.

*Homer* vs. *Brown*, 16 *How.* 354, is cited, to show that the fact that the Court, in the former case, passed upon the merits, does not of itself conclude those merits. Of course not. In that case the parties agreed that, if the opinion of the Court on the merits should be against the plaintiff the judgment should be "non-suit;" that is to say, that a judgment, with the fixed legal character of inconclusiveness, should be entered.

In all of these cases cited by plaintiff, it will appear that where the former judgment or decree was held not to be conclusive, either a different *right* was claimed and decided in the two cases, or the parties were different, or, as in 16 *How.* 354, a form of jungment, known to be inconclusive, was by agreement, entered.

CHARLES P. JAMES.

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